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IMPLEMENTATION OF THE INTERNATIONAL COVENANT
ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Day of General Discussion "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15.1 (c) of the Covenant)" organized in cooperation with the World Intellectual Property Organization (WIPO)

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"Drafting History of the Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights"

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1. Painted in broad strokes, the current debate over intellectual property and human rights centres on two separate but deeply entwined issues: on the one hand, concern over access to patented scientific advances that impact on human health and food supply; and on the other, concern over misappropriation of traditional knowledge held by communities rather than invented by contemporary individuals.[1]

2. The principal legal sources for broaching these issues in human rights terms are the Universal Declaration of Human Rights (UDHR), article 27, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 15. Both provisions set up, in nearly identical language, rights that seem to address both access to scientific progress and protection of the interests of individual creators. The texts of the two documents read as follows:

> UDHR:
>
> 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
>
> 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
>
> ICESCR:
>
> 1. The States Parties to the present Covenant recognize the right of everyone:
>
> (a) To take part in cultural life;
>
> (b) To enjoy the benefits of scientific progress and its applications;
>
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
>
> 2. The steps to be taken by the States parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
>
> 3. The States parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
>
> 4. The States parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

Both documents appear to set up an unresolved tension between the provisions protecting access to advancement on the one hand and those protecting individual creators' rights on the other.

3. Although the ICESCR language appears to track the UDHR closely, however, article 15 (1) (c) was not an automatic inclusion in the ICESCR. Interestingly enough, the provision was explicitly excluded from that document at repeated drafting sessions of the United Nations Commission on Human Rights (CHR). It made its way into the Covenant only during a remarkably inconsequential debate of the Third Committee of the General Assembly in 1957, three years after the Commission had completed its work and five years after the cultural rights provision itself had last been debated. The history of the drafting discussions of the intellectual property rights aspects of the UDHR and, especially, the ICESCR, provide some intriguing perspectives on the current human rights debates.

The Universal Declaration of Human Rights[2]

4. According to Johannes Morsink's account of the drafting history of article 27 of the UDHR, there was not much disagreement at any point over the notion of the right of everyone, including those who did not participate in creating them, to enjoy the benefits of scientific advances. Cassin, the French delegate, stated that "even if all persons could not play an equal part in scientific progress, they should indisputably be able to participate in the benefits derived from it",[3] an approach which seems to reflect the general understanding of the Commission.[4]

5. In contrast, the discussion of authors' rights was more fraught, and more complex. According to Morsink, there were several issues at play. The French delegation, which proposed the original language on authors' rights, was concerned primarily with the "moral" rights mentioned in the text, which had to do with an author's control over alteration and other misuse of the creation, and which distinguished intellectual property rights from other property rights, covered elsewhere in the Declaration.[5] It was argued that moral rights ensured that "[t]he authors of all artistic, literary, scientific works and inventors shall retain, in addition to just remuneration for their labour, a moral right on their work and/or discovery which shall not disappear, even after such a work or discovery shall have become the common property of mankind".[6] Chang, the delegate from China, later stated that "the purpose of [a moral rights provision] was not merely to protect artists but to safeguard the interests of everyone. [...] [L]iterary, artistic and scientific works should be made accessible to the people directly in their original form. This could only be done if the moral rights of the creative artist were protected".[7] In other words, the provision could also be seen as protecting the integrity of the author's creation as much as the author him- or herself.

6. A further factor, which came into play during later drafting sessions, was the outcome of two international events that took place in 1948: the Berne International Copyright Convention and the drafting of the American Declaration on the Rights and Duties of Man. The American Declaration included a provision on authors' rights, and its slightly altered text was eventually offered by the French delegation as the basis for discussion in subsequent CHR drafting sessions.[8] The provision was rejected in the Commission but passed in the Third Committee, despite objections that intellectual property rights were adequately covered by the existing property rights provision or that they were not properly speaking a "basic human right".[9] Morsink tells us that some delegations in the Third Committee voted for the provision on the "moral rights" issue but that some others, especially a number of Latin American countries, backed it "more as a step towards the internationalization of copyright law",[10] or even, he

implies, as a nod towards the American Convention. At the final count, the highest proportion of proponents of the provision were from Latin America. The Communist countries (which were to play an important role in the decision on the same topic for the ICESCR) abstained from the vote.[11]

7. Morsink's chapter doesn't give any indication of a widespread discussion of the possible tension between paragraphs 1 and 2 of article 27; the issues involved in balancing the individual creator's rights with those of the community as a whole do not appear to have been substantively debated, or at least not in any detail. Not surprisingly, there is also no intimation of the issue of traditional knowledge or of indigenous peoples' particular concerns with regard to ownership of intellectual property.[12]

The International Covenant on Economic, Social and Cultural Rights[13]

A brief chronology

8. In early 1951, at its twelfth session, the United Nations Economic and Social Council (ECOSOC), acting at the bequest of the General Assembly, directed the Commission on Human Rights to include economic, social and cultural rights in the draft "covenant on human rights" that it was then preparing.[14]

9. The Commission began to discuss text on economic, social and cultural rights that same spring, in its seventh session (April-May 1951). The Commission's first substantive discussions of a treaty provision on cultural rights took place at this time, with extensive input from UNESCO. A draft article, eventually to be numbered article 30 of the single planned covenant on human rights, was adopted by the Commission during this session.

10. In July-September of 1951 ECOSOC reviewed the text prepared by the Commission. At the end of the session, its thirteenth, the Council invited the General Assembly to reconsider its decision to include both economic, social and cultural rights and civil and political rights in a single document. The General Assembly took account of this suggestion at its sixth session, in November 1951-February 1952, and decided to pursue two separate and simultaneous covenants, one to cover civil and political rights and the other to cover economic, social and cultural rights. It asked ECOSOC to ask the CHR to draft two separate documents, "the two covenants to contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible ...".[15]

11. The Commission on Human Rights accordingly returned to the drafting process during its eighth, ninth and tenth sessions, which ran between 1952 and 1954. The provision on cultural rights was discussed, and the Commission's proposed text finalized, in the eighth session, of April-June 1952.

12. The full text of both Covenants was conveyed to the General Assembly during the General Assembly's ninth session, in 1954. The General Assembly in turn passed the text to its Third Committee, to be gone through article by article at the following session.

13. The Third Committee began considering the two draft Covenants at the General Assembly's tenth session, in 1955. It reached the ICESCR's article on cultural rights at its twelfth session, in 1957, at which point the provision on authors' interests was successfully introduced into the document. The Third Committee's debate in 1957 was effectively the final discussion of the cultural rights provision, although the General Assembly revisited the ICESCR twice in following years (in 1962 to discuss articles 2-5 and in 1963 to introduce the explicit right to freedom from hunger), before formally adopting the full convention in 1966.

The substantive debates[16]

Commission on Human Rights, seventh session

14. At its seventh session the Commission was just beginning to tackle the inclusion of economic, social and cultural rights provisions into the single planned "draft covenant on human rights". When it arrived at cultural rights, in May 1951, it had the benefit of some advance work by UNESCO,[17] which eventually presented the Commission with two versions (one long and one short) of a draft provision.[18] At this early stage cultural rights were still being considered as part of a single article covering education and culture.[19]

15. The initial UNESCO draft contained the following provisions:

> Article (d)
>
> The Signatory States undertake to encourage the preservation, development and propagation of science and culture by every appropriate means:
>
> (a) By facilitating for all access to manifestations of national and international cultural life, such as books, publications and works of art, and also the enjoyment of the benefits resulting from scientific progress and its application;
>
> (b) By preserving and protecting the inheritance of books, works of art and other monuments and objects of historic, scientific and cultural interest;
>
> (c) By assuring liberty and security to scholars and artists in their work and seeing that they enjoy material conditions necessary for research and creation;
>
> (d) By guaranteeing the free cultural development of racial and linguistic minorities.
>
> Article (e)
>
> The Signatory States undertake to protect by all appropriate means the material and moral interest of every man, resulting from any literary, artistic or scientific work of which he is the author.[20]

16. The shorter alternative UNESCO proposal read:

> The Signatory States undertake to encourage by all appropriate means, the conservation, the development and the diffusion of science and culture.
>
> They recognize that it is one of their principal aims to ensure conditions which will permit every one:
>
> 1. To take part in cultural life;
>
> 2. To enjoy the benefits resulting from scientific progress and its applications;
>
> 3. To obtain protection for his moral and material interests resulting from any literary, artistic or scientific work of which he is the author.
>
> Each signatory State pledges itself to undertake progressively, with due regard to its organization and resources, and in accordance with the principle of non-discrimination enunciated in paragraph 1, article 1 of the present Covenant, the measures necessary to attain these objectives in the territories within its jurisdiction.[21]

17. The second UNESCO proposal became in effect the basis for the Commission's discussions in the seventh session.

18. There are two points of particular interest in the Commission's early discussion of the draft human rights treaty. The first is that although the text of ICESCR 15, in particular, ended up closely resembling that of the UDHR, this was an outcome that some delegates were from the beginning generally concerned to avoid, in part for fear of undercutting UDHR language *not* repeated. Eleanor Roosevelt, representing the United States, declared that:

> "It would be well to recall the difference between the Universal Declaration of Human Rights and the draft First International Covenant. The former consisted of a statement of standards which countries were asked to achieve. ...But ... a covenant was a very different kind of document, since it must be capable of legal enforcement. The task of drafting such an instrument was wholly unlike that of setting out hopes and aspirations relating to the rights and freedoms of peoples."[22]

Sorensen, the Danish delegate, argued that "[i]t would clearly be undesirable merely to transpose the relevant sections from the Universal Declaration to the draft Covenant, for to do so would weaken the authority of the former, and lead to unwarranted conclusions about the significance of those of its provisions which were not reiterated in the latter".[23]

19. The second point of interest is that the provisions on benefiting from scientific progress and on authors' rights, respectively, received very different treatment throughout the seventh session debates. From the beginning, there seems to have been little dissension over the notion of including a right to benefit from cultural and scientific advances.

20. Havet, speaking for UNESCO on 5 May, declared that "[t]he right of everyone to enjoy his share of the benefits of science was to a great extent the determining factor for the exercise by mankind as a whole of many other rights".[24] He later added that "[e]njoyment of the benefits of scientific progress implied the dissemination of basic scientific knowledge, especially knowledge best calculated to enlighten men's minds and combat prejudices, coordinated efforts on the part of States, in conjunction with the competent specialized agencies, to raise standards of living, and a wider dissemination of culture through the processes and apparatus created by science".[25] No one seems to have quarrelled with these characterizations, and the relevant text, i.e.

> They recognize that it is one of their principal aims to ensure conditions which will permit every one:
>
> 1. To take part in cultural life;
>
> 2. To enjoy the benefits resulting from scientific progress and its applications;

was adopted by 15 votes to none, with three delegations abstaining.[26]

21. When it came to the proposed language on authors' rights, however, the nay-sayers outnumbered the proponents by some margin. Among the proponents, Havet, the UNESCO representative, said that:

> "The UNESCO delegation considered that recognition of authors' rights should find a place in the Covenant, since it had already been included in the Universal Declaration, and represented a safeguard and an encouragement for those who were constantly enriching the cultural heritage of mankind. Only by such means could international cultural exchanges be fully developed."[27]

He had earlier mentioned that:

> "With regard to the protection of the moral and material interests of authors and artists, UNESCO was proceeding with the task of harmonizing national and international legislation and practice in that field. It was hoped that a convention would be submitted to Governments, for signature in 1952, relative to the interests of artists and writers, including scientific writers, but excluding the question of scientific discovery in the strict sense of the term, and of patents, in connection with which special studies were being made by the UNESCO Secretariat."[28]

22. The French delegation, which was strongly pushing the authors' rights language, argued that "[t]he relevant passages ... merely stressed that the moral and material interests of persons taking part in cultural and scientific life should be safeguarded. It would be unfortunate to omit from the Covenant principles already stated in the Universal Declaration regarding protection of the moral and material rights of authors, artists and scientists".[29]

23. Among the opponents, Roosevelt, speaking for the United States, stated that:

> "[i]n her delegation's opinion the subject of copyright should not be dealt with in the Covenant, because it was already under study by UNESCO which ... was engaged on the collation of copyright laws with the object of building up a corpus of doctrine and in due course drafting a convention. Until all the complexities of that subject had been exhaustively studied, it would be impossible to lay down a general principle concerning it for inclusion in the Covenant."[30]

24. Santa Cruz, speaking for the Chilean delegation, said that "while the protection ... was useful in certain circumstances and at certain periods in the life of nations, the question was not one involving a fundamental human right. In his submission, the rights of all individuals enunciated in paragraph 2 of article 3 [presumably this refers to the benefits of scientific progress phrase] were of far greater and wider import".[31]

25. The passage was rejected by 7 votes to 7, with 4 delegations abstaining.[32] The full article on cultural rights was then adopted by 14 to none, with 4 delegations, including the French, abstaining.[33]

Commission on Human Rights, eighth session

26. One year later, in May of 1952, the Commission returned to the cultural rights provision, this time in the context of a separate Covenant on Economic, Social and Cultural Rights. Once again, the question of protection of authors' rights was debated, and this time more heatedly than before.

27. The French delegation, resubmitting the original provision, argued that:

> "The draft covenant included provisions for the protection of the property and emoluments of professional workers and should therefore be completed by a provision for the protection of the moral and material interests resulting from scientific, literary or artistic production .... It was not a matter only of material rights; the scientist and artist had a moral right to the protection of his work, for example against plagiarism, theft, mutilation and unwarranted use."[34]

28. The American delegation, still represented by Eleanor Roosevelt, reiterated its position that the issue was too complex to be dealt with in the Covenant, and should be addressed elsewhere.[35] The United Kingdom adopted a similar position,[36] as did Yugoslavia.[37] UNESCO, while agreeing that the subject was complex, argued briefly for including the provision in the Covenant, as "it was nevertheless desirable to state the need for such protection in that instrument".[38]

29. Other delegations, however, raised at this session some of the questions that appear to have gone largely undiscussed during the previous debate. Valenzuela, the Chilean delegate, stated that:

> "He fully sympathized with the praiseworthy intentions of the French delegation and agreed that intellectual production should be protected; but there was also need to protect the under-developed countries, which had greatly suffered in the past from their inability to compete in scientific research and to take out their own patents. As a result, they were in thrall to the technical knowledge held exclusively by a few monopolies. As the French amendment would perpetuate that situation, he would have to vote against it. In general, the subject was so complex that it would have to be dealt with in a separate convention than in a single article of the covenant on human rights".[39]

30. Azmi bey, the Egyptian delegate, agreed with this position,[40] and Whitiam, the Australian delegate, took a similar approach, saying that "it was inadvisable to provide for the protection of the author without also considering the rights of the community".[41]

31. The substantive responses to these concerns came from the United Kingdom (which however was rejecting the provision on other grounds), and the French. Juvigny, the French representative, said simply that "[h]e did not agree with the Chilean representative that monopoly in the field of patents represented such a grave danger; moreover, the absence of protection was not a remedy for the unfavourable situation in under-developed countries".[42] Hoare, representing the United Kingdom, responded to the underlying issue more fully:

> "The Chilean representative had raised an interesting point: the conflict between the conception that the rights of the creative worker must be protected and the principle that there should be no obstruction to the general utilization of the results of his work in the interests of humanity. In the light of these remarks, sub-paragraph (b) of the original article 30 deserved further examination. He had always understood it to mean that the benefits of scientific progress were to be made available to all within the limits and by use of the machinery which already existed. If the Chilean representative believed that the clause was intended to do away with all the intermediaries between the inventor and the general application of his invention, he was proposing to reform the world by one brief article. Such a conception went far beyond the scope of the covenant, and the United Kingdom delegation could not subscribe to it".[43]

There is no record of this line of discussion being pursued further, however, and the final vote was probably based on several different lines of reasoning. At any event, the passage on authors' rights was once again rejected, this time by a vote of seven to six, with four delegations abstaining.[44]

32. The draft article that was finalized in that session and eventually submitted to the General Assembly read as follows:

ARTICLE 16

Rights relating to culture and science

1. The States Parties to the Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications.

2. The steps to be taken by the States Parties to this Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the Covenant undertake to respect the freedom indispensable for scientific research and creative activity.[45]

General Assembly Third Committee, twelfth session

33. After the Commission finalized its draft text of the two Covenants the drafts were sent, with annotations, to the General Assembly, and from there to the Third Committee for review. The Third Committee reached the draft article on cultural rights at its twelfth session, in late October and early November 1957.

34. Once again, there was no dissent concerning the provision on enjoying the benefits of scientific progress. The only reference to that passage was by D'Souza, the Indian representative, who mentioned that "undoubtedly scientific discoveries should benefit not only all individuals, but also nations, regardless of their degree of development".[46] His characterization was not disputed.

35. With regard to the authors' rights provision, however, the situation was once again more complicated and more fraught. The French delegation, again represented by Juvigny, urged that it be included in the final document but refrained from proposing it itself.[47] The formal proposal was made by Uruguay, represented by Tejera, who "considered that a reference to authors' copyright was imperative. For lack of international protection, literary and scientific works, for example, were frequently pirated by foreign countries which paid no royalties to the authors".[48] Uruguay later added that "the right of the author and the right of the public were not opposed to but complemented each other. Respect for the right of the author would assure the public of the authenticity of the works presented to it".[49]

36. The responses to the proposal varied widely. A number of states seemed to believe that because the provision had been in the UDHR, its omission in the draft text of the ICESCR must have been an oversight. Hoare, again representing the United Kingdom, said that:

> "The amendment submitted by Uruguay undoubtedly made good an omission. He did not recall exactly why the Commission on Human Rights had rejected a similar recommendation, nor what stand his delegation had taken. But it certainly seemed to him now that it was essential to include a provision corresponding to that in article 27, paragraph 2, of the Universal Declaration of Human Rights in the Covenant. He congratulated the representative of Uruguay on its action."[50]

37. UNESCO advised including the provision.[51] Chile, which had opposed the provision in the Commission on Human Rights, now supported it: "As one of the signatories of the Universal Copyright Convention, which was fully in accordance with its own legislation, Chile had no difficulty in supporting that amendment."[52]

38. Other statements of support, based on the theory of encouraging culture, came from Sweden ("the protection of those rights would be an encouragement to science and creative activity"[53]) and Israel ("the provisions of the draft covenant should not be in any way weaker than those of the Universal Declaration of Human Rights. It would be impossible to give effective encouragement to the development of culture unless the rights of authors and scientists were protected"[54]). Delegations like the Dominican Republic based their support primarily on the protection of the author: "[the provision] should have the support of all delegations, as its essential purpose was to ensure that men and women should enjoy the fruits of their intellectual and artistic efforts and that their work should not be pirated or exploited by unprincipled editors and publishers".[55]

39. The first objection came from Nur, the Indonesian delegate, who cited the arguments in the Commission on Human Rights, saying that "the matter could not be treated adequately in a short provision and that authors' rights had to be considered in the light of the claims of the public in all countries".[56] Morozov, the USSR delegate, also recalled the arguments on complexity that had come up in the Commission on Human Rights. He added that:

> "Furthermore, by inserting a clause of that kind the balance of the Covenant would be upset. An examination of the nature of the rights set forth in that instrument would reveal that they were rights which concerned all mankind, but the clause that it was proposed to add to article 16 concerned a particular group. The fact that a principle was enunciated in the Universal Declaration of Human Rights did not mean that it should be repeated automatically in the Covenant."[57]

Later, the USSR delegate drew a distinction between a provision mandating national-level protection of authors' rights, which he would favour "on condition that the words 'in accordance with the laws of the States concerned' or some similar formula was added," and one mandating international obligations, which he would not. He stated that "if it was a question of relations between States in regard to copyright and patents, he considered that such relations should be governed by special agreements outside the scope of the covenants on human rights".[58] He also questioned whether the Covenant clause would "[exceed] the scope of existing conventions".[59]

40. Other objections came from Saudi Arabia (which pointed out that scientific research, unlike literary and musical works, "was usually the result of teamwork" and therefore raised special questions)[60] and, particularly, Czechoslovakia, which argued that:

> "States would find it difficult to adhere both to the existing international instruments concerning copyright [including the Universal Copyright Convention of 1952] and to article 16 [as the article was then numbered] as amended ... That Convention and other international agreements on the subject took into account the special conditions in the different countries. If all such agreements were to be superceded by the [amendment] proposal, the position would be far from clear ... She was puzzled by the sponsors' motives in submitting their amendment. If they found the existing agreements on the subject unsatisfactory, it was difficult to see why they had not insisted on a full debate on what was a very delicate and complicated question, instead of trying to push through a hastily drafted and unsatisfactory text, which might well be misinterpreted."[61]

Uruguay replied that:

> "The effect of the UNESCO and other international conventions would be gradually to bring the legislation of the contracting countries into line with a minimum acceptable level, but most countries, including his own, were already far ahead of those conventions. Objections to the amendment seemed to come only from countries which did not feel that they could assume the obligation of progressively carrying authors' rights into effect. Finally, there seemed to be every reason to maintain intact the text which appeared in the Universal Declaration of Human Rights."[62]

The Uruguayan delegate had earlier declared that "[t]o state that authors' rights should be protected in accordance with the laws of each country [as the USSR had suggested], would be to introduce a dangerous stipulation, since it was not impossible that certain States might arrogate to themselves the profits accruing from artistic property".[63]

41. In the end, the provision on authors' rights was voted in by a margin of 39 to 9, with 24 delegations abstaining.[64]

42. The final vote on the provision probably owes a great deal to the context of the debate. The overall discussion of the cultural rights had been dominated by the continuation of an earlier argument about the desire of the Eastern Bloc to add the phrase "in the interest of the maintenance of peace and cooperation among nations" to the second paragraph.[65] This debate had started in the Commission on Human Rights, but in the Third Committee its political overtones were more overt and pronounced, and the subtext to the entire discussion was the issue of government control over science and art, and scientists and artists.[66]

43. The provision on authors' rights, judging from the exchanges between the USSR, Czechoslovakia, and Uruguay, became associated with protection for authors' freedom from state intervention. Any substantive issues to be worked out on the relation between the "benefits" clause and the "authors'" clause never had a real chance for discussion. The final vote was straight down cold war faultlines, with the opposed roster holding Romania, Ukrainian Soviet Socialist Republic, USSR, Albania, Bulgaria, Byelorussian Soviet

Socialist Republic, Czechoslovakia, Hungary, and Iraq, and the pro roster holding Mexico, Morocco, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Portugal, Spain, Sweden, United Kingdom, Uruguay, Venezuela, Argentina, Australia, Austria, Belgium, Brazil, Canada, Ceylon, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Finland, France, Ghana, Guatemala, Haiti, Honduras, Ireland, Israel, and Italy.[67] Indonesia, which had been one of the early delegations to speak out against the provision, was among the abstainers.[68]

Conclusions

44. In the context of modern human rights issues, articles 15 (1) (b) and 15 (1) (c) of the ICESCR raise very real questions of interpretation and implementation. We face a world with issues that the drafters of the ICESCR could never have envisaged, from an AIDS epidemic reigning in one part of the world while the drugs that could help are largely owned in another, to scientifically engineered non-reproducing crops, to scientists "bio-prospecting" for traditional knowledge whose ownership does not fit into existing patent definitions.[69] Then, too, with the recent tying of intellectual property to trade law, international intellectual property rights have undergone a sea-change, becoming universal, compulsory, and enforceable in ways that were never dreamt of in the middle of the last century.[70]

45. By raising both the right to "benefit from the advances of science" and the right to "material and moral interests resulting" from one's work to the level of human rights, the drafters set up a tension that must be resolved if article 15 is to be made effective. It is fascinating to note, however, that the distinguished men and women who gave us the ICESCR did not seem to deeply consider the difficult balance between public needs and private rights when it comes to intellectual property. When the question was raised, they tended to dismiss it almost out of hand. Primarily, they seem to have assumed that the goals of 15 (1) (b) were obvious and beyond discussion, the benefits of science being a fundamental human right that belongs to everyone. They seem to have seen article 15 (1) (c), however, as a smaller thing, one that served to protect several different potential interests, according to the views of the drafter: some delegates were concerned to entrench in international law the author's individual rights to control the "moral" aspects of his or her work; some were concerned to confirm that "moral" right as a means of protecting the public interest in the integrity of a published creation; some were probably guided by a simple desire to reinforce the existing international copyrights laws. In all cases, however, it is noticeable that the drafters appeared to be thinking almost exclusively of authors as individuals. Perhaps it was obvious from the fact that this was a "human rights" treaty, but the drafters do not seem to have been thinking in terms of the corporation-held patent, or the situation where the creator is simply an employee of the entity that holds the patent or the copyright.

46. As a human rights analysis is developed for intellectual property, it will have to address a set of government decisions in the domestic and international sphere that have dramatic impact on the rights to food and health. Taking a human rights approach to intellectual property means examining whether research development policies, price regulations, marketing rules, and a myriad of other policy decisions, including above all international trade or investment agreements, effectively protect the rights of all to the "benefits of scientific progress". A human rights analysis of the TRIPS Agreement and its progeny, in particular, requires us to face

head-on the boundaries of what ICESCR 15 (1) (c) can and should protect. The relationships among trade, investment, intellectual copyright law, the human right to benefit from scientific progress, and the rights to food and health, among others, all need to be carefully and slowly untangled. An interesting starting point might be the thought that the rights of authors were included in the end as an explicit part of the human rights regime, and the encouragement of creativity and the protection for the public of the integrity of finished products were recognized as important public goals, but 15 (1) (c) does not seem to have been written as an intentional limit on the rights of all to benefit.

Notes

[1] See, inter alia, resolution 2000/7 of the United Nations Commission on Human Rights (2000); collected articles in *Intellectual Property and Human Rights* (Proceedings of a Panel Discussion Held by the World Intellectual Property Organization [WIPO] in Collaboration with the Office of the UN High Commissioner for Human Rights, 9 November,1998); "Building Human Rights Safeguards into the TRIPS Agreement" (Box, *Human Development Report 2000*, p. 84), and Rosemary J. Coombe, "Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity" 6 Ind. J. Global Leg. Stud. 59, Fall, 1998. See also studies and reports by WIPO on intellectual property and traditional knowledge (available online at http://www.wipo.int/traditionalknowledge/documents/index.html).

[2] In the following brief discussion of the drafting history of the UDHR provision I have relied primarily on chapter 6.3 of Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*. University of Pennsylvania Press, 1999. Apparently a detailed history of this provision, prepared by Richard Pierre Claude at the request of the American Association for the Advancement of Science, also exists. See citation to Richard Pierre Claude, "Scientists' Rights and the Right to the Benefits of Scientific History" in footnote 24 of Audrey Chapman, "A Human Rights Perspective on Intellectual Property" in *Intellectual Property and Human Rights* (Proceedings of a Panel Discussion Held by the World Intellectual Property Organization in Collaboration with the Office of the United Nations High Commissioner for Human Rights, 9 November 1998), pp. 126-168.

[3] Morsink p. 219, citing A/C.3/261, p. 619.

[4] Note however that Verdoodt, in an earlier account than Morsink's, mentions that the USSR delegate expressed concern at one point that the passage might imply an obligation to reveal scientific secrets. The United States delegate assured him that it did not: "Madame Roosevelt (E.U.) fait noter dans le rapport qu'il n'en est pas question". A. Verdoodt, *Naissance et Signification de la Declaration Universelle des Droits de l'Homme*, Louvain, 1964, p. 254, citing E/CN.4/AC.2/SR.9, pp. 2-4.

[5] Morsink p. 219. According to Peter Drahus, infra note 70, "The term 'copyright' ... refers to those common law systems that characterize the exclusive rights of authors in essentially economic terms (the rights to reproduce the work, to publish it and to adapt it are examples). Within civil law systems, the rights of authors are seen, at base, as being about the protection of

the authorial personality (the right to be acknowledged as the author of the work and the right to control alterations to the work are core rights). These systems are not referred to as copyright but rather as authors' rights". pp. 13-14.

[6] Morsink, p. 220, citing E/CN.4/W.2/Rev.2.

[7] Morsink, p. 222, citing A/C.3/261, p. 628.

[8] Morsink, p. 220.

[9] Morsink, p. 221.

[10] Morsink, p. 221.

[11] Morsink, p. 222.

[12] However, Morsink includes, in a later chapter, a fascinating discussion of why group rights were not, in the end, explicitly mentioned in the UDHR. See Morsink, pp. 269 ff.

[13] For the discussion of the drafting history of the ICESCR I have consulted numerous United Nations documents, which are detailed in the footnotes below. I am indebted to Yvonne Donders of Maastricht University for providing me with an invaluable list *of Travaux Preparatoires* documents.

[14] "Draft International Covenants on Human Rights: Annotation". Report of the Secretary-General to the Tenth Session of the General Assembly, 1 July 1955. UN document number A/2929, p. 11. The original General Assembly directive was in resolution 421 E (V).

[15] Ibid., p. 14. The General Assembly resolution was number 543 (VI).

[16] Several of the delegates mentioned below had been key figures in the drafting of the UDHR. Morsink describes an "inner core" of UDHR drafters that has included, inter alia, R. Cassin of France, P.-C. Chang of China, C.H. Malik of Lebanon, E. Roosevelt of the United States and H. Santa Cruz of Chile. See Morsink, pp. 28-31.

[17] According to the UNESCO representative at the 1957 Third Committee debate, UNESCO had convened a meeting of experts following its 1951 General Conference to discuss definitional issues concerning cultural rights. A reference to a report of the meeting cites document number 7C/PRG/10. The Third Committee comment can be found in A/C.3/SR.796, p. 4.

[18] The UNESCO draft suggestions were submitted in document number E/CN.4/541/Rev.1.

[19] A collection of proposed text available to the Commission at this time can be found in E/CN.4/AC.14/2.

[20] E/CN.4/AC.14/2, p. 3.

[21] E/CN.4/AC.14/2, p. 4.

[22] E/CN.4/SR.206, p. 12. Note that quotes such as this, taken from the summary record of the proceedings, reflect the record's notes on what was said and are not a direct transcript of the speaker's words.

[23] E/CN.4/SR.207, p. 11.

[24] E/CN.4/SR.228, p. 11.

[25] E/CN.4/SR.228, p. 12.

[26] E/CN.4/SR.230, p. 7.

[27] E/CN.4/SR.228, p. 13.

[28] E/CN.4/SR.228, p. 12. It is interesting that UNESCO was distinguishing between "the interests of artists and writers, including scientific writers" and "the question of scientific discovery in the strict sense of the term, and of patents".

[29] E/CN.4/SR.229, pp. 12-13.

[30] E/CN.4/SR.229, p. 10.

[31] E/CN.4/SR.230, p. 8.

[32] E/CN.4/SR.230, p. 7.

[33] E/CN.4/SR.230, p. 8.

[34] E/CN.4/SR.292, pp. 8-9.

[35] E/CN.4/SR.292, pp. 8-9-.

[36] See E/CN.4/SR.292, p. 9 and E/CN.4/SR.293, p. 9.

[37] E/CN.4/SR.293, p. 5.

[38] E/CN.4/SR.292, p. 13.

[39] E/CN.4/SR.292, p. 7.

[40] E/CN.4/SR.292, p. 8.

[41] E/CN.4/SR.292, p. 14.

[42] E/CN.4/SR.292, p. 14.

[43] E/CN.4/SR.292, p. 10.

[44] E/CN.4/SR.294, p. 4.

[45] Draft International Covenants on Human Rights: Annotation. Report of the Secretary-General to the tenth session of the General Assembly, 1 July 1955, UN Document number A/2929, p. 329-.

[46] A/C.3/SR.796, p. 7.

[47] See A/C.3/SR.796, p. 11.

[48] A/C.3/SR. 797, p. 6.

[49] A/C.3/SR.798, p. 9.

[50] A/C.3/SR.798, p. 5. See also the statements of Belgium (p. 4), Italy (p. 4), Guatemala (p. 8), Costa Rica (p. 12), Ecuador (A/C.3/SR.799, p. 4), and the Philippines (SR.799, p. 5).

[51] A/C.3/SR.796, p. 3.

[52] A/C.3/SR.799, p. 5.

[53] A/C.3/SR.798, p. 7.

[54] A/C.3/SR.798, pp. 9-10.

[55] A/C.3/SR.799, p. 3.

[56] A/C.3/SR.798, p. 2.

[57] A/C.3/SR.798, p. 6.

[58] A./C.3/SR.798, p. 11.

[59] A./C.3/SR.798, p. 11.

[60] A/C.3/SR.798, p. 13 and SR.799, p. 8.

[61] A/C.3/SR.799, p. 6.

[62] A/C.3/SR.799, pp. 7-8.

[63] A/C.3/SR.798, p. 12.

[64] A/C.3/SR.799, pp. 11-12.

[65] See A/C.3/SR.795, p. 4.

[66] See the statement of the United Kingdom delegate, A/C.3/SR.795, p. 5: "... a statement of the aims of [scientific] research might provide a pretext for State control over scientific research and creative activity. He was firmly opposed to any control in the matters of science and culture ...".

[67] A/C.3/SR.799, pp. 11-12.

[68] A/C.3/SR.799, pp. 11-12.

[69] For a discussion of traditional knowledge and patent definitions in the TRIPS Agreement, see John Mugabe, "Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse", in *Intellectual Property and Human Rights* (Proceedings of a Panel Discussion Held by the World Intellectual Property Organization in Collaboration with the Office of the UN High Commissioner for Human Rights, 9 November 1998) pp. 96-125, at p.-109.

[70] See Peter Drahos, "The Universality of Intellectual Property Rights: Origins and Development," in *Intellectual Property and Human Rights* (Proceedings of a Panel Discussion Held by the World Intellectual Property Organization in Collaboration with the Office of the UN High Commissioner for Human Rights, 9 November 1998) pp. 12-41, at pp. 19-23.

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Item 3 of the provisional agenda

IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS

DAY OF GENERAL DISCUSSION

"Everyone has the right to benefit from the protection of moral and material interests which flow from all artistic, literary or scientific productions of which he is the author" (art. 15, para. 1 (c), of the Covenant)

Monday, 27 November 2000

Protection of cultural property: an individual and collective right

Background paper submitted by Mr. Patrice Meyer-Bisch, Coordinator of the Interdisciplinary Ethics and Human Rights Institute and of the UNESCO Chair in human rights and democracy, University of Fribourg (Switzerland)

GE.00-45029 (E)

1. This brief paper does not deal with intellectual property in the traditional sense, but with interference between the right to own property (unfortunately not included as such in the two Covenants) and the cultural rights which are provided for in article 15. Paragraph 1 (c) refers to a right which comes within both categories. As a property right, it is both individual and collective; as a cultural right, it is not only individual and collective, but is also a res communis. The protection of cultural property therefore relates not only to an individual right, but also to a public asset which it is vital to protect now that privatization is likely to cut off access by the poorest to cultural resources and to prevent individuals as well as groups from enjoying the freedoms which are necessary for creative activity. This right lies at the crossroads of very different ways of thinking and is the core of the democratic system. I will refer to it below in connection with the three terms which compose it as a legal relationship: its beneficiary, its object and its suppliers.[1]

1. The beneficiary, alone or in association

2. The right to own property is a human right because it is inherent in the beneficiary. It is a matter not only of having, but also of existing or, more precisely, of having a basic minimum in order to exist; it is a prerequisite for the beneficiary's existence, dignity and identity. The right to own property is the indispensable underpinning of all freedoms because, where a minimum of resources is lacking, freedoms are merely academic. Article 15 first and foremost defines freedoms, together with the conditions that are necessary for them.

3. It is important to spell out the relationship between the right to own property and freedoms in order to show that this right occupies pride of place within the human rights system as a whole and within each "group of rights", particularly cultural rights. According to the traditional doctrine, the right to own property is a guarantee of an increase in powers and hence of a diversity of actors, both in market and in public forum terms. This right brings the individual and collective beneficiary's autonomy directly into play. Everyone, alone or in association, has the right to take part in the enjoyment of assets which are necessary to his autonomy and inherent in his dignity. The logical link between property and freedom was established by Locke. In the "Second Treatise of Civil Government", the philosopher justified property by the fact that man mixed his labour with nature and joined to it something that was his own and thereby made it his property. Property is therefore a conquest and a guarantee of freedom to work, an indivisibly social, cultural and civil right, the foundation of the democratic system. More precisely, the term *property*, denoting life, liberty and fortune, means that man's essence, which we now define by his culture, is an indivisible combination of a given (nature) and of labour added to it (Fuchs, 1994, 111). This right can be found at the very root of the beneficiary's nature. *The right to own property, which the beneficiary exercises alone or in association, is the right to preserve for himself the space necessary to his identity.* To be a property owner is to have the freedom to pause a little to take a look at others and things.

4. The difficulty with the right to own property - and what makes it interesting - is that, since it cuts across all the usual categories of human rights, it provides a particularly clear explanation of the existential connection between the beneficiary of the right and the network of relationships without which it is unintelligible, including the material dimensions that this linkage implies. The dignity of the beneficiary is therefore *linked* to the enjoyment of assets, whether they are things, a territory or a capacity for trade. These assets *link* the beneficiary not

only to things, but also to the others with whom he partly shares such enjoyment. The right to own property therefore leads us to think of the beneficiary not as an isolated individual, but as an individual who fits into his environment: the capacity to appropriate things and to identify with a heritage and with a social group is a fundamental cultural freedom. The lack of recognition of this right as such in the Covenants can probably be explained not only by the ideological cold war divide, but also by the inevitable doctrinal question: what is the nature of the beneficiary of human rights? In what way is he linked to his environment? *We are still dealing with the individual, but with the capacity to appropriate things.* Property cannot be regarded exclusively as a safeguard of the individuality of the beneficiary in relation to his different needs; it also includes work tools and the common property of a family, or an enterprise, as well as public property. This is why article 17, paragraph 1, of the Universal Declaration states that: "Everyone has the right to own property alone as well as in association with others". The words "as well as" are significant. They relate not only to the collective exercise of an individual right, but also to the capacity of the beneficiary of the right freely to form, and to be recognized as a member of, a group. The beneficiary's capacity for appropriation is particularly significant for cultural rights as a whole, since it denotes his freedom to recognize his identity as being linked to a heritage, a community and an occupational culture.[2]

5. Man takes part of his identity from what he has appropriated:[3] a farmer cannot be explained without his field or a nomad without his herd, but they can also not be defined only in terms of their possessions. The right to privacy, to freedom, to a work tool and to the fruit of one's labour - everything that relates to identity and property is private. The culture of a human being, like that of a group, is like a layer of skin. It is superficial and identifying, weak and strong, with a very intimate surface reactivity; it gives the appearance of being inside out; it enables the beneficiary to become the object, to be placed dangerously at the disposal of others, freely to create bonds of social membership.

6. "Cultural property" thus means more than "intellectual property" because account must be taken not only of what is produced by an artist, a scientist or a writer, but also of what is produced by a cultural community,[4] by the custodians of a heritage or by a people. Each creative activity is based on a common cultural capital - and this explains why individual creativity and collective property must be protected *at the same time*. This means establishing a close link between article 15, paragraph 1 (b) and (c), as two aspects of the protection of the right to take part in cultural life.[5]

7. Copyright is not to be understood here as being restricted to artistic, scientific or literary creativity; craftsmen also have a copyright on their work, just as a community or a people as a whole has a copyright on its cultural identity. Ownership of one's territory, dwelling, work tools and the fruits of one's labour is a means of guaranteeing equitable *cultural autonomy* and establishing a border or demarcation line with regard to a uniform market that cannot produce anything but standardized articles. With its economic dimension, copyright protects the freedoms necessary for creativity. In the case of a large community, the economic dimension means having the resources required for cultural autonomy. It is important to note that the protection of the right to cultural property guarantees both economic freedoms and cultural freedoms, which are elements of a market logic which fits into a public forum. *The right to cultural property guarantees that the holder is both author and actor in terms*

of rights/freedoms/responsibilities, in the case of an individual; or, that rights/freedoms/responsibilities are exercised jointly by individuals who identify themselves as members, in the case of a group.

8. A distinction therefore has to be made between the two characteristics of the holder of this right:

> *The subject*, i.e. the author and actor of the right and of that of others, *is always an individual*; respect for his human rights always takes precedence over respect for the human rights of any group;
>
> *The beneficiary*, who receives the advantages guaranteed by the right in question, may be an individual or a group (measures of protection may be intended for an individual, a minority group, a cultural community, a people).

This distinction is important in order to avoid confusion between individual and collective rights holders: the subject is always individual, but the beneficiary may be collective. However, the purpose of the right cannot be confined to measures of protection which affect the beneficiary: the issue is one of empowerment and of recognition of the author's entitlement as actor, whether individual (subject) or collective (social actor). The protection of the moral and material interests of a common heritage (as in the case of traditional knowledge of medicinal plants) affects the members of this group as authors and actors of a cultural asset which they share, as well as their political freedom to form a group. The right to own property allows the individual to move or be delegated towards the freely recognized group. Protecting the heritage of a group means guaranteeing a resource which is indispensable to the identification and activity of individuals who identify themselves within it and of the social actors of which they freely form part. It is also a way of protecting an asset that can be useful to a large number of people.

9. There are thus two holders (whether subjects or beneficiaries, individuals or groups): the author and the user. The right to cultural property not only strikes a balance between two *interests*, as in the case of an ordinary right, but, since it is a human right, it ensures that it is within everyone's grasp, as a resource necessary for everyone's activity and sense of identity. Just as property is an interface between the individual and the group, it is also a link between the author and the user. It is all the more important to explain this link in that the distinction is still not very clear-cut.

10. In a society where protected works are becoming increasingly complex and may be interactive as well (a book, but also a scientific theory, a traditional piece of knowledge, a Web page, a computer software program, an on-line newspaper on the Internet), it is becoming more and more difficult to differentiate between the author's activity and that of the holders of "neighbouring rights" and, in particular, between the whole body of knowledge which belongs in the public domain and between the different actors involved in research (sources/design/production/distribution). *A work is part of mankind's living memory:* it is not the individual who must be protected at any cost, but the "memory", the testimony to creativity, communication and use. The protection of individuals is relative to that which their other rights requires (particularly the right to work) and to the rights enjoyed by the users of a work. This

interactivity between authors makes the distinction - which was the basis for the right to intellectual property - between the presentation of a work and its content harder to draw. Only the presentation of the work was protected by copyright, not the content, which belongs to everyone (Vivant, 2000). Nowadays, presentation is usually interactive. It is difficult to tell the difference between the private part and the public part of a work.

2. The appropriated object, private and collective

11. The cultural specificity of the right to own property is thus twofold:

That of the author's copyright on a work; and

That of a beneficiary's copyright on a joint work.

The object of the right is not a thing (material or non-material), *but the appropriation by the beneficiary of this thing, linking him to others*. The two aspects of this link can be expressed by the term "moral and material interests".

The material means which guarantee the material autonomy of freedom: wages and use of means of production, communication and distribution;

The non-material means which guarantee the cultural autonomy of freedom and creative activity: authority over the interpretation and use of the work.

12. The right to cultural property recognizes a *close link* between the beneficiary of human rights and the objects which the subject freely appropriates: works, heritages, traditions, communities. The aim is not to confine the beneficiary within these memberships, but to guarantee the right to claim them, subject to respect for all other human rights. An object is therefore not only an individual work, but also one which is shared; it is all the more valuable in that it establishes a link between generations and between cultures.

13. The individual and collective dimensions of the beneficiary correspond to the individual and shared dimensions of the object. The individual and collective nature of property must therefore be safeguarded with the same determination because both are indispensable to freedoms. Collective property must be protected against privatization, just as private property must be safeguarded against abusive collectivization. While respect for private property guarantees the freedom of individuals and the interactive wealth of cultural and economic systems, respect for collective property make it possible to guarantee that it remains "free", for, otherwise, individual freedoms have no common resource.[6] Excessive privatization diminishes the capital of creativity to which each individual should have access. In a more general way, *the object of the right, property, is always a bridge between persons and each right involves managing the relationship between what is private and what is collective*. The issue is one of adjustment, of the right balance between property and its holder, whether private or collective. One decision-making criterion is knowing who the beneficiary should be and who can assume the responsibilities relating to such property.

14. The object, i.e. property, can itself be understood on many levels. Roman law distinguished between *usus* (the right to use property), *fructus* (the right to receive income from property) and *abusus* (the right to dispose of property by transforming it, transferring it, or even destroying it). Property is never absolute (in the sense of non-relative) because it cannot be materially, socially or economically isolated. But if distinctions between *usus*, *fructus* and *abusus* are essential to indicate differences in the nature of property, they also indicate a degree of difference, showing that the concept of property is, in the proper sense of the term, analogical. In relation to democratic society, *abusus* is more directly liable to be restricted; in relation to human rights, *usus*, the right to use property, is the substance of the right, its intangible core when the use of the asset is inherent in the dignity of the beneficiary. Whatever the differences between economic and political systems, there is a basic feature, one which guarantees the personal or community use which is necessary to the autonomy of the actors, authors and users alike. The fact that property is not absolute in form does not mean that it is not a fundamental value.

15. The right to own property does, however, raise one very important question: it is a right to inequality and, while this is true of all freedoms – a fact which is not stated often enough - in this case, it is absolutely crystal clear. The idea of property is thus fundamentally asymmetrical; it separates the haves from the have-nots. We have to stop taking the easy egalitarian approach, which sometimes makes declarations about human rights look vaguely moralistic, and start dealing with the problem of protecting "inequalities which are useful to everyone" (Rawls). Property is not an abusive privilege when the owner uses it for others as he does for himself. In the case of cultural property, this principle is easier to apply because cultural assets can be shared more easily. The protection of this right is nevertheless the basic condition for the safeguard and development of the cultural wealth of our societies, as well as that of every individual. The question of equality that is referred to in a democracy is equality of dignity, not equality of achievement. *Being an owner is mainly being the owner of a difference,*[7] the right of exclusion can – by means of this comprehensive monitoring – be understood as an inequality which is useful for everyone, an inequality which brings about a global increase in human resources. As ethical democratic standards, moreover, human rights require that there should not be two classes, that of owners and that of non-owners, but that each person should be able to enjoy differences and that multiplied and coordinated property should be a key component of the multiplication of the coordinated powers that go to make up a democratic culture.

All are suppliers

16. The right to own property lies at the heart of the process of ongoing democratization, since it signifies respect for the property/responsibility link. It means recognizing that anyone who claims to own property has a responsibility. This holds true for everyone, from companies and all their owners to citizen's associations which claim collective ownership of property, such as a coastline, a green or urban space, and even for cultural associations which are responsible for intellectual property. Although it is true that respect for the right to own property is essential to the functioning of democracy because it increases decision-making and control centres, its realization also has to be ensured: the right to own property is democratic only insofar as it is defined in all useful ways.

17. Being an owner means being accountable to other users of this property and to those who are linked to it. The suppliers are therefore first and foremost owners themselves because property is legitimate only on one condition: that the owners' responsibilities are defined. Property is thus never isolated. It is an asset in the market economy, ensuring an economy of powers which are more or less controlled by a system of democratic rules; a number of obligations, explicit or not, are linked to it: no property is free of encumbrance. The right to own property must be interpreted in a deeply economic manner; it is encumbered by permanent charges owed to others. This is even more true in the case of cultural property: the poor suffer most from a want of knowledge-sharing and a lack of access to the resources necessary for their empowerment as actors and authors of their own rights.

18. This means that a democratic limitation on the right to own property is set by the ongoing existence of poverty. We are not simply referring to marginal poverty because, in that case, it would be enough to bring a humanitarian remedy. *It is the loss of human capital and capacities (Sen) which sets the boundary for the legitimacy of the right to own property* when failure to respect this right is prejudicial to human resources and their development and use.

19. The obligations of the State are thus basically obligations to guarantee rules of the game which allow the implementation of this right by all actors. The principle of *democratic regulation* is to replace all arbitrary limits on the right to own property by comprehensively establishing multiple interactive monitoring to guarantee the meaning, security, growth and consistency of the private/public relationship. States can therefore no longer use the "within the limits of available resources" excuse because their main obligations are to free up cultural actors and guarantee their rights to act on their own to implement all the cultural rights embedded in other human rights.

20. In internal law, this means protecting the material and moral interests of *cultural actors* (artistic, scientific, craft, literary and religious associations and associations for the protection of the cultural identity of groups which are discriminated against) so that they can enjoy the autonomy and the authority to which they are entitled in a democratic society, in the service of their members and of society as a whole. The objective is no longer a split between public and private actors, but a real transition to autonomy for all civil and private cultural actors through interaction with public actors.

21. At the international level, the protection of this right means a dialogue between all public, civil and private actors to safeguard the moral and material interests of the poorest population sectors, not only through appropriate measures in the field of patents and intellectual property, but also through a clarification of the different components of a cultural heritage and the obligations which it entails for every individual and for every authority, regardless of borders. The main objective is to define what forms part of the intangible core of the cultural heritage of every individual and community and without respect for which the other cultural rights cannot be implemented (for example, language rights, the right to work and all freedoms). Tampering with cultural property means tampering with the universal element which is present in every person, every culture, and every work. The challenge is to identify this requirement of universality in human beings and the things of daily life, i.e. *the essence of* every woman and every man, even in their freedom to form a community.

22. Instead of giving a list of obligations imposed on States, it is appropriate to clarify the obligation of defining complex "cultural policies" which promote interaction between all cultural actors by guaranteeing the rules of the game and, in particular, forums for debate so that the problem of striking the right balance between the interests of individual and collective holders of this right may be managed on a daily basis. The right to cultural property shows that there is a dividing line between that which is marketable and that which is not: no rule can a priori define the limits, apart from the need to protect all human rights. The first obligation is to establish clear rules for the continuing debate between all the actors concerned, with full representation for the most deprived.

Notes

[1] See in this connection: P. Meyer-Bisch, *The right to education in the context of cultural rights*, 1998, E/C.12/1998/17.

[2] This is why the "Fribourg Group" has adopted the wording of article 17 to refer to the beneficiary of every cultural right: "Everyone, alone or in association". See "Cultural rights. Draft declaration", Meyer-Bisch (Dir.Pub.), 1998, Paris, UNESCO, Fribourg, éd. Universitaires. The English and Spanish translations are available on our Web site: www.unifr.ch/iiedh.

[3] Not only what he has appropriated for himself, but what he has appropriated: collective property which he has used to feed himself and which he has made a part of his identity.

[4] The idea of "cultural community" is not to be understood primarily in the ethnological sense; it applies to any community based on culture, such as a scientific community. See article 1 (c) and article 4 (freedom to identify with a cultural community) of the above-mentioned draft declaration.

[5] In the above-mentioned draft declaration, article 5, paragraph 3, on participation in cultural life, states: "It also entails the right to the protection of material and non-material interests derived from works which are the product of one's cultural activity". See commentary on this article, op. cit., para. 45, p. 37.

[6] In the field of science, this is the problem of "open science". Without this principle, there is no scientific community and no scientific creativity.

[7] All cultural rights protect differences, but this is not the same thing as saying that they are "rights to be different" because being different is not a value in itself. What counts is the interaction between differences (interactive diversity), i.e. wealth.

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SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Day of general discussion: "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15 (1) (c) of the Covenant)"

Protecting the rights of Aboriginal and Torres Strait Islander traditional knowledge

Background paper submitted by the Aboriginal and Torres Strait Islander Commission (Australia)

The Aboriginal and Torres Strait Islander Commission (ATSIC) is the peak body representing Aboriginal and Torres Strait Islander peoples in Australia. ATSIC is an independent statutory authority established by the Commonwealth Government under the Aboriginal and Torres Strait Islander Commission Act 1989 (the ATSIC Act).

ATSIC was designed to embody the principle of "self-determination" for indigenous Australians and to devolve decision-making activities in indigenous affairs to regional and community level. Through ATSIC's representative arm, Aboriginal and Torres Strait Islander people participate in the processes of government. Elected representatives are able to make decisions about projects, programmes and policies that affect their communities. At the national level, ATSIC's elected commissioners represent the views of indigenous communities from all parts of Australia.

1. Traditional knowledge is an important aspect of indigenous power and identity, which is often collectively owned, socially based and continually evolving. Indigenous peoples generally view the world in which we live as an integrated whole as our beliefs, knowledge, arts and other forms of cultural expression have been handed down through the generations.[1] Indigenous traditional knowledge encompasses not only arts-related cultural expressions, but also indigenous ecological and biological knowledge. Traditional knowledge about plants such as their location, habitats and their properties (e.g. medicinal value) is an increasingly valuable commodity, sought after by the pharmaceutical, agricultural and cosmetic industries. There is also a growing interest in "bush foods", an industry that draws heavily on indigenous peoples' knowledge about the uses of these foods.

2. Traditional knowledge is a protectable subject matter that should afford the holders of that knowledge the legal possibility of obtaining enforcement of their rights through conventional intellectual property systems. Indigenous peoples not only want the right to protect their traditional knowledge, but also the right to share in the economic benefits derived from that knowledge. Indigenous laws that govern the use and transmission of traditional knowledge at community level need formal recognition, as these internal regimes have been developed from repeated practices and are monitored and enforced by our elders and spiritual and community leaders.

3. Indigenous peoples' rights to traditional knowledge differ from conventional intellectual property rights in a number of important ways. These include:

(a) They are communal rights, often vested in clan, family or other socio-political groups;

(b) They cannot be readily associated with a single, identifiable individual creator, author or producer;

(c) They are managed and owned in accordance with customary rules and codes of practice, and are usually not sold or alienated in ways that conventional intellectual property rights can be;

(d) They include rights to all forms of traditional knowledge such as intangible cultural products and expressions, all of which are not protected under conventional intellectual property laws;

(e) Indigenous traditional knowledge is usually transmitted orally and is therefore not subject to the same requirements regarding material forms that pertain to conventional intellectual property systems.

Because of these significant differences, conventional intellectual property laws cannot provide adequately for the recognition and protection of traditional knowledge.

Terminology

4. In Australia, as in the international arena, there are ongoing debates about the appropriate terminology in regard to traditional knowledge. The United Nations Educational, Scientific and Cultural Organization (UNESCO) focuses on the term "expressions of folklore" which covers "the characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community".[2] Aboriginal and Torres Strait Islander people consider the term "folklore" to be inappropriate to denote indigenous cultures as it diminishes the importance of indigenous cultures as a living heritage.

5. The term "traditional knowledge" often refers only to ecological and biological knowledge including the management and conservation of such resources and the environment, all of which have economic, commercial as well as cultural value. However, it is becoming recognized that in the broad sense, traditional knowledge encompasses both ecological and biological knowledge as well as artistic and cultural expressions.

6. While traditional knowledge is the term used in this paper to cover both the tangible and intangible aspects of indigenous culture, it should be stated that in its policy deliberations, ATSIC has adopted the working definition "indigenous cultural and intellectual property". This term is based on the definition of "heritage" contained in the draft principles and guidelines for the protection of the heritage of indigenous peoples (E/CN.4/Sub.2/1994/31, annex) by Erica-Irene Daes, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights and former Chairperson of the Working Group on Indigenous Populations. This definition includes all aspects of Aboriginal and Torres Strait Islander heritage such as:

(a) Literary, performing and artistic works (including songs, music, dances, stories, ceremonies, symbols, languages and designs);

(b) Languages;

(c) Scientific, agricultural, technical and ecological knowledge (including cultigens. medicines and the phenotypes of flora and fauna);

(d) Spiritual knowledge;

(e) All items of moveable cultural heritage;

(f) Indigenous ancestral remains;

(g) Indigenous human genetic material (including DNA and tissues);

(h) Immovable cultural property (including sacred and historically significant sites and burial grounds);

(i) Documentation of indigenous peoples' heritage in archives, film, photographs, videotape or audiotape and all forms of media.

This definition is intended to reflect indigenous peoples and cultures in a contemporary sphere and is based on our survival and consensus within our communities. As previously stated, for the purposes of this paper the term "traditional knowledge" will comprise the above working definition.

Protecting traditional knowledge in Australia

7. Aboriginal and Torres Strait Islander traditional knowledge has become a key focus of the Australian national identity and now represents a core part of what is distinctive about Australia. The interest in Aboriginal and Torres Strait Islander culture has been cited as a major reason for the growth of Australia's international tourism industry. It has been estimated that the indigenous arts and crafts market is worth $200 million per year and half of the sales relate to the tourism market.[3] The downside to the tourism market is the authenticity of products. Unfortunately, cultural symbols of Aboriginal and Torres Strait Islander peoples are often used without recognition of their source. Not surprisingly, there has been a growing concern among indigenous peoples that appropriation of indigenous culture by the wider community fails to benefit the communities that own the artistic and cultural symbols.[4]

8. Aboriginal and Torres Strait Islander peoples and their communities have grappled for many years to preserve our culture and to control the use and misappropriation of our traditional knowledge. The concerns expressed by Aboriginal and Torres Strait Islander peoples that have been highlighted over the past 30 years in various government reports and in the recent ATSIC publication, Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights (1998).

9. The publication is the outcome of ATSIC's process of consultation with Aboriginal and Torres Strait Islander peoples to develop an indigenous position on intellectual property. Our Culture, Our Future recommends possible solutions in three major areas: legislative solutions; administrative responses (policies, protocols and codes of ethics); education and awareness programmes for both indigenous peoples and the wider community. The report also focuses on the cultural disparities that exist within Australian society, particularly with regard to the different cultural concepts of "property" that exist between Aboriginal and Torres Strait Islander communities and the wider Australian community. An example is that indigenous peoples do not necessarily view their traditional knowledge in terms of "property" but in terms of community and individual responsibility.

10. Conventional intellectual property laws are designed to provide monopoly rights to creators and inventors, and to encourage economic and commercial growth. This system of laws, which includes patents, copyrights, plant breeders' rights, designs and trademarks, is being

increasingly challenged by new and emerging technologies. As previously stated, it is also being challenged by Aboriginal and Torres Strait Islander peoples as it is claimed that our traditional knowledge is not protected by current intellectual property laws. Some of the major issues and concerns are outlined below.

Copyright Act 1968

11. While Aboriginal and Torres Strait Islander peoples have the same rights as other Australians to protection under the Copyright Act, the law does not recognize other significant issues that are specific to Aboriginal and Torres Strait Islander peoples. This has been highlighted by a number of court cases that have attracted significant media attention in regard to copyright infringements. Consequently, the Copyright Act does not meet all the needs of indigenous Australians. This is particularly evident in the protection of traditional knowledge that has been passed down orally from generation to generation and is owned communally.

12. ATSIC believes there is an urgent need to address culturally specific issues in conventional intellectual property legislation. As previously stated, there have been a number of examples of copyright infringements. Some of them are:

> The late Wandjuk Marika, a prominent Aboriginal artist and Chairman of the Aboriginal Arts Board of the Australia Council, first raised the issue of copyright infringement in 1970. He was deeply offended by the unauthorized reproduction of his artwork depicting a special creation story belonging to his clan. The distorted and trivialized version of Mr. Marika's artwork was not only deeply hurtful to him but the securing of financial resources necessary to mount a legal challenge in order to seek redress was not available to him. He stated that while he was happy that people were interested in Australian Aboriginal culture, he would also request that artists and craftworkers have access to legal protection in order to prevent their works being copied or reproduced without their permission.[5]
>
> In 1989, action was brought by John Bulun Bulun and 13 other Aboriginal artists to obtain compensation against a T-shirt design company called Flash Screenprinters for the unauthorized reproductions of their works on T-shirts. This case attracted considerable media attention. Injunctions and an out-of-court settlement of $150,000 were obtained in this matter.
>
> A more recent reported case concerning the unauthorised copying of the designs of Aboriginal artists was Milpurrurru and Ors v. Indofurn Pty Ltd. This case concerned the importation by a Perth-based company of carpets manufactured in Viet Nam. On these carpets were the reproduced designs of George Milpurruru, Banduk Marika, Tim Payungka Tjapangati and five deceased Aboriginal artists. All the designs had been copied from a portfolio of artworks produced by the Australian National Gallery. The defendants in this case were obliged to pay substantial damages.

The souvenir industry produces reproductions, or purported reproductions of Aboriginal and Torres Strait Islander designs and other objects for the tourist market. Many of them are cheap items that convey an impression, often inaccurate, of Aboriginal and Torres Strait Islander influence. An example is in the manufacturing of didgeridoos where the cutting of the raw material, the stripping, curing and painting of the instrument are being dominated by non-indigenous people and marketed as "Aboriginal made" products.[6]

Non-indigenous artists and graphic designers are using indigenous designs and images in their artwork and passing off their work as "Aboriginal" styles. An example is the "X-Ray Koala" which contains the distinctive Rarrk style of artwork from Arnhemland in Northern Australia. This use of this distinctive style of artwork misleads the consumer into believing they are buying products from the Arnhemland region.[7]

A related issue is the appropriation of indigenous art styles, songs, stories and themes by both indigenous and non-indigenous artists who do not have the permission of the custodians of these images.

Limitations of the Copyright Act

13. Aboriginal and Torres Strait Islander peoples want to obtain protection for the stories, songs and dances that have been passed down orally from generation to generation. Under the current Copyright Act, protection is not accorded unless the stories, songs and dances are original and recorded in material form.[8] However, where a sound recording (e.g. tape or video recording) is made of a story, the person making the sound recording would be the copyright owner of that recording even though an Aboriginal or Torres Strait Islander community may believe the story belongs to their particular community.

14. In the event that the stories, songs and dances are recorded in material form, the Copyright Act does not protect them in perpetuity. This issue was outlined in the Our Culture, Our Future which stated, "[t]he period of copyright protection for artistic, musical, dramatic and literary works is generally the creator's life plus 50 years".[9] The concern is that Aboriginal and Torres Strait Islander arts and cultural expressions are culturally significant indefinitely. One of the major areas of concern is that the current Copyright Act does not protect images in rock paintings. The images in the rock paintings have been reproduced on a wide range of items. These paintings have been in existence since time immemorial and are culturally significant and an integral part of a particular clan's traditional knowledge. Unfortunately, these images are not accorded protection under the Copyright Act.[10]

15. Under the Copyright Act, the photographer owns copyrights on photographs unless the photograph is a commissioned portrait. The difficulty this poses for Aboriginal and Torres Strait Islander peoples is that they have no way of controlling photographic reproductions of themselves, their deceased family members and their sacred sites.[11]

16. Even when the Copyright Act does afford protection to Aboriginal and Torres Strait Islander peoples, there are often practical limitations inherent in the broader Australian legal system which prevent Aboriginal and Torres Strait Islander groups from benefiting from this

protection. Such practical limitations include a lack of knowledge about the legal rights that copyright may afford creators, lack of understanding of who is a copyright owner, unequal bargaining power and limited funding available to bring copyright infringement actions. Further, the area of copyright law is specialized, complex and expensive and therefore often not available to many indigenous peoples and communities. At the same time, it is acknowledged that test cases that have come before the courts such as Milpurrurru and Ors v. Indofurn Pty Ltd (1995) and Bulun Bulun v. R and T Textiles Pty Ltd (1998) have had the effect of highlighting complex issues in copyright infringement cases.[12]

Patents and traditional knowledge

17. The Australian Patents Act (1990) provides a monopoly right to an inventor of a product or a process. Aboriginal and Torres Strait Islander peoples have criticized the fact that the products and processes that are the subject of patent applications are in fact derived from, or based on indigenous peoples' traditional knowledge and innovations, a good example being knowledge of medicinal plants and natural food resources. The patenting of this knowledge and products denies the rights of indigenous peoples to any benefits.[13]

18. The nature of innovation and knowledge management in indigenous societies is not generally considered to be compatible with the requirements of the existing patent system. The patent system, as with other forms of intellectual property, confers ownership rights upon individuals and has as its primary objective the encouragement of economic and commercial growth. Indigenous traditional knowledge and innovations, by contrast, are transmitted over generations, mostly through our oral traditions. Indigenous innovation is thus a long-term process, and is managed according to a complex system of collective rights and interests.

19. The importance of plant products to pharmaceutical, cosmetics and agricultural companies has been of major concern to Aboriginal and Torres Strait Islander peoples. Further, the use of patents by pharmaceutical and research companies to protect their rights with respect to products and processes highlights issues of concern. The patenting of a product or processes derived from naturally occurring products which have been used by indigenous peoples and communities since time immemorial raises moral and ethical questions. For example, how was the knowledge about the product or process obtained, and to what extent did indigenous innovators and users of the products participate in the acquisition of the product and its patenting? Further, did this process involve indigenous knowledge and techniques? Importantly, were adequate provisions, through compensation, protection and benefit-sharing, made for recognizing the contribution of indigenous communities?[14] It is these important issues that need to be addressed in terms of protecting indigenous traditional knowledge.

International participation

20. Australia is signatory to the Convention on Biological Diversity. Article 8 (j) of the Convention recognizes indigenous peoples' involvement in developing, conserving and sustainably using the biological resources on our lands and territories for millennia.

21. ATSIC recently sent a delegation to the Fifth Conference of Parties (COP 5) to the Convention of Biological Diversity held in Nairobi in May 2000. Indigenous representatives had

direct input into the Convention processes and a direct bearing on the outcomes. The major outcomes included the adoption of a work plan for advancing awareness of the protection of indigenous traditional knowledge and recognition of the role of women in the conservation and sustainable use of natural resources. Indigenous peoples from Australia have generally been well represented at meetings and, because of continuity of attendance, provide considerable leadership at the international level when dealing with issues in regard to the Convention on Biological Diversity.

22. Attendance at international meetings has been a priority for ATSIC in the development of appropriate international standards that can influence the Australian Government to introduce relevant laws that are consistent with international standards. As previously stated, attendance at international meetings on the protection of traditional knowledge leads to increasing awareness and understanding of indigenous concerns. However, at the domestic level, there is the major concern that there is no guarantee that Aboriginal and Torres Strait Islander peoples will be included in government processes or will ultimately benefit. At the policy level, there is uncertainty regarding the nature and extent of indigenous interests and involvement.

Outstanding matters for the protection of traditional knowledge

23. ATSIC is interested in pursuing the issue of resale royalty rights for Aboriginal and Torres Strait Islander visual artists. Resale royalty is the right of an artist to claim a share of the proceeds of each successive resale of an original artwork. Resale royalty rights are protected in copyright law in other countries, notably in French law where is it recognized as droit de suite. The issue of resale royalty is particularly relevant to Aboriginal and Torres Strait Islander artists as recent recognition of their work, both in Australia and internationally, has led to the rapid increase in value of their work. In many cases, the benefits of this increase have been to purchasers and dealers rather than the artists themselves.[15]

24. Moral rights is another issue that is of interest to Aboriginal and Torres Strait Islander peoples. Moral rights are a legal concept that refers to an author's right to stop distortion or destruction of his/her work. While these rights are recognized in international law by which Australia is bound as a signatory to the Berne Convention, a Moral Rights Bill has only recently been introduced into the Australian Parliament. For Aboriginal and Torres Strait Islander peoples, the cultural integrity of any cultural reproductions is critical, as indigenous custodians are collectively responsible for ensuring that any reproductions comply with customary laws. Therefore, the recognition of moral rights within the Copyright Act is seen as a step towards protecting the cultural aspects embodied in traditional knowledge. However, ATSIC has emphasized that any proposed moral rights legislation should go beyond the issue of individual rights and address indigenous concerns, including the recognition of the communal rights of indigenous custodians.[16]

25. Owing to the limitations of the existing intellectual property laws, ATSIC believes that serious consideration must be given to the establishment of a sui generis (specific) legislative framework to protect indigenous traditional knowledge. In considering the development of sui generis approaches, ATSIC believes it is important to consider emerging international standards and indigenous statements, which provide a framework within which beneficial

sui generis systems could be introduced. Some of these include the draft United Nations declaration on the rights of indigenous peoples as well as the work pursued by UNESCO and the World Intellectual Property Organization (WIPO). Indigenous peoples' statements include:

The Mataatua Declaration (June 1993);

The Belem Declaration (1988);

The Julayinbul Statement (November 1993);

The Kari-Oca Declaration (May 1992).

26. The development of sui generis approaches need to be based on new forms of legislation that provide recognition and protection of indigenous forms of intellectual property. These include the recognition of particular features such as collective rights, benefit-sharing and communal forms of ownership.

Conclusion

27. Each year Aboriginal and Torres Strait Islander communities see more evidence of cultural appropriation and are therefore keen to gain some defensive control. The general lack of recognition and protection of traditional knowledge has become a major concern over the past 30 years for Aboriginal and Torres Strait Islander peoples. Despite the fact that there have been a number of Government Inquiries dealing with the issue of protecting indigenous traditional knowledge, very few changes have been implemented.

28. Despite this situation, there have recently been some measures put in place to protect the authenticity of indigenous-produced arts and cultural products. In November 1999, the National Indigenous Arts Advocacy Association Inc. launched the authenticity label to assist consumers to identify genuine Aboriginal and Torres Strait Islander arts and cultural products which in turn will benefit indigenous artists.

29. One of the concerns currently facing ATSIC in implementing the recommendations of Our Culture, Our Future has been the minimalist approach taken by the Australian Government. For example, government departments have consistently indicated that their mandate is limited to developing education and awareness strategies to promote greater awareness of indigenous intellectual property rights as well as reforms that can be achieved within a framework of existing intellectual property laws. While the development of reforms within existing intellectual property laws is critical to the achievement of better protection for indigenous traditional knowledge, additional initiatives such as sui generis systems must also be pursued.

30. The pace of reform as pursued by the Australian Government is likely to be relatively slow and, as previously stated, reforms are only likely to take place within existing legal frameworks. In the report Our Culture, Our Future, it is evident that indigenous peoples hold the

view that existing intellectual property laws do not go far enough in terms of providing for the recognition and protection of our communal rights to traditional knowledge. Indigenous peoples also want control over decision-making in relation to our traditional knowledge. In Australia, existing intellectual property laws are limited for the following reasons:

They emphasize economic rights over cultural rights;

They do not cover the range of issues that indigenous peoples consider as their traditional knowledge (e.g. oral stories, dance, etc. which are not in written form);

They only provide protection for defined periods of time and do not provide permanent protection.

31. Given these facts and the limitations of existing laws, ATSIC is committed to pursuing additional initiatives, including the consideration and development of sui generis legislation to cover all aspects of indigenous traditional knowledge.

32. The traditional knowledge of indigenous peoples provides the foundation of our personal identity and ancestral anchorage. It provides a distinctive world view that outsiders can rarely grasp. Indigenous rights to our traditional knowledge is part of the overall challenge to colonial paternalism and underlying systemic racism that is evident in the approaches to Aboriginal and Torres Strait Islander affairs.

33. Indigenous rights have yet to be given comprehensive definition in Australia and Aboriginal and Torres Strait Islander peoples have to be part of this process. Consequently, we need to guide the debates on how to protect our traditional knowledge. We need the protection and right to say no to commercialization, exploitation, misuse and abuse of our cultural resources. If we choose to commercialize, donate or share our knowledge, then our interests need to be protected and we must be compensated where exploitation has occurred.

Notes

[1] Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights, 1998, p. 2.

[2] WIPO, Roundtable on Intellectual Property and Traditional Knowledge (Geneva, 1 and 2 November 1999), document WIPO/IPTK/RT/99/2, para. 3.

[3] National Aboriginal and Torres Strait Islander Cultural Industry Strategy, ATSIC, 1997, p. 5.

[4] Proceedings of the Australian Reconciliation Convention, Book 1, 26-28 May 1997, Australian Government Publishing Service, Canberra, p. 73.

[5] Wandjuk Marika, Wandjuk Marika Life Story as told to Jennifer Isaacs (1995), University of Queensland Press, St. Lucia, p. 118.

[6] Our Culture, Our Future, p. 39.

[7] Ibid. p. 37.

[8] Ibid, p. 56; Australian Copyright Council Bulletin No. 75, p. 31.

[9] Our Culture, Our Future, p. 59.

[10] Ibid.

[11] Ibid. p. 56.

[12] Stopping the Ripoffs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples, 1994, p. 11.

[13] M. Davis, "Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to Protection", Aboriginal and Islander Law Reporter, vol. 4, No. 4, November 1999, p. 18.

[14] Ibid. p. 22.

[15] Australian Copyright Council, 1992, p. 39.

[16] Our Culture, Our Future p. 55.

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Item 3 of the provisional agenda

IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON
ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Day of General Discussion "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15.1 (c) of the Covenant)" organized in cooperation with the World Intellectual Property Organization (WIPO)

Monday, 27 November 2000

PROTECTION OF INTELLECTUAL PROPERTY UNDER THE TRIPS AGREEMENT

Background paper submitted by the
Secretariat of the World Trade Organization

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* The document, is issued, as submitted.

GE.00-46412 (E)

Introduction

1. This paper examines human rights of individuals and public interest as traditional foundations of intellectual property protection and looks at how they are reflected in the present multilateral intellectual property law, in particular in the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), which is part of the Marrakesh Agreement Establishing the World Trade Organizations ("WTO Agreement"). The paper examines the way that the TRIPS Agreement gives effect to the rights envisaged in article 27.2 of the Universal Declaration of Human Rights ("UDHR") and article 15.1 (c) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and gives a number of examples of how the provisions of the Agreement promote certain other human rights. It also studies how the interdependent nature of human rights is mirrored in the emphasis on balance in the TRIPS Agreement, allowing member countries to adopt measures within and outside the IP system to take into account various societal interests in implementing its provisions. The final sections take a closer look at two areas, first the issue of patent protection of pharmaceutical products and its relationship to the promotion of public health, and secondly the current debate on the protection of traditional knowledge and how the TRIPS Agreement relates to that issue.

2. An Annex to the paper contains a brief summary of the main features of the TRIPS Agreement.

Origins and objectives of intellectual property

3. Both human rights and public interest were used to justify early intellectual property systems. The human rights approach was first explicitly manifest in the French revolution. The 1789 Declaration of the Rights of Man and of the Citizen included "property" among the "natural and imprescriptible rights of man". In the context of the adoption of the Law of 1791 providing a right of representation to authors, it was argued that "the property of the work which is born of the writer's thought is the most sacred, the most legitimate, the most unassailable and the most personal of all properties". In the modern context, the notion of a "natural right" might often be replaced by an appeal to a sense of equity and fairness: it is seen as fair that, for example, a free-lance journalist, a composer or an inventor would draw some benefit from others using the fruits of his or her creative efforts for economic gain.

4. The United States Constitution of 1787 justifies the legislative authority granted to the Congress in intellectual property matters on grounds of public interest: "The Congress shall have power [...] to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The objective of the authority is to promote the progress of science and useful arts; the means to this end is the provision, for limited times, of exclusive rights to authors and inventors.

5. Human rights and the equitable treatment of authors and inventors, on the one hand, and public interest, on the other hand, remain the underpinnings of intellectual property systems. While the civil law tradition might sometimes emphasise more the first and the common law tradition the second approach, it would appear that these two conceptual starting points are complementary rather than mutually exclusive. Besides, it should be noted that the social objectives vary between different areas of IP: while modern copyright and patent laws have

been designed to encourage creative work and technological innovation and provide means to finance research and development, the focus of trade mark laws is more on consumer protection and in ensuring fair competition among traders.

6. The development of national IP systems and international trade during the nineteenth century raised awareness of the need for international protection. After a period of bilateral trade agreements, the first multilateral agreements were concluded, namely the Paris Convention for the Protection of Industrial Property in 1883, and the Berne Convention for the Protection of Literary and Artistic Works in 1886. Since then, these two treaties have been periodically updated and additional treaties have been concluded.

7. The economic importance of intellectual property has grown in recent decades with the increasing role of information and knowledge-based industries. For example, a number of studies showed that by the 1980s the contribution of copyright industries to the gross domestic product of certain countries was in the order of 3-5 per cent. The number of people employed in these industries also grew steadily. With the increasing interdependence of national economies, it became clear that there no longer existed a functioning multilateral rule of law in this area to regulate relations and differences between countries. This led to the inclusion of IP matters in the GATT Uruguay Round negotiations, launched in 1986, and the conclusion of the TRIPS Agreement as part of a package of agreements that make up the WTO. The results were adopted by consensus by the 125 participating Governments. The Agreement entered into force in 1995, although it gives members transitional periods, which differ according to their stage of development, to bring themselves into compliance with its rules. Subject to certain exceptions, developed countries had to implement TRIPS as of the beginning of the year 1996 and developing countries as of the beginning of the year 2000. Least-developed country members may delay application until the year 2006.

IPRs and human rights

8. The TRIPS Agreement is contained in Annex 1C to the WTO Agreement. The overall objectives of the WTO, as reflected in the Preamble to the WTO Agreement, concern also the TRIPS Agreement. The Preamble recognizes that member countries' trade and economic relations "should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development". It also recognizes the "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".

9. The objectives of the TRIPS Agreement, as explicitly set out in its article 7, put emphasis on the public interest rationale of intellectual property protection. This article, entitled "Objectives", says that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a

manner conducive to social and economic welfare, and to a balance of rights and obligations". This corresponds with the objectives article 15.1 (a) and 15.1 (b) of the ICESCR, which recognize the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications.

10. While the expressly stated objectives of the WTO Agreement and the TRIPS Agreement lay emphasis on promoting social and economic welfare, articles 27.2 of the UDHR and article 15.1 (c) of the ICESCR underline the need to protect the interests of authors and inventors in the results of their intellectual efforts not only for the sake of the broader public interest but because they are recognized as worthy of protection as such. However, it can be argued that the TRIPS Agreement, including the pre-existing IP conventions incorporated into it,[1] also seeks to give effect at the multilateral level to article 15.1 (c) of the ICESCR, which establishes everyone's "right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" as a human right.[2] This would appear, for example, to be indicated by the statement in the Preamble to the TRIPS Agreement that recognizes that intellectual property rights are private rights.

11. It should be added that the TRIPS Agreement promotes also other values deemed essential for the realization of human rights. For example, the TRIPS Agreement prohibits discrimination on the basis of the nationality in the area of intellectual property rights;[3] this is supportive of the non-discrimination principles contained in the human rights instruments. The Agreement promotes the rule of law at the national level; it requires, inter alia, the observance of due process by requiring that judicial procedures are fair and equitable, decisions are in writing and reasoned, and that parties have an opportunity to appeal.[4] The Agreement provides for international cooperation to fight copyright piracy and trade mark counterfeiting,[5] which often have links to organized crime.

12. The TRIPS Agreement promotes the rule of law also at the multilateral level between States by commonly agreed rules and peaceful settlement of disputes through a multilateral system. Member countries have agreed to give effect to the minimum standards provided in the Agreement within their own legal system and practice and remain free to implement in their law more extensive protection than required by the Agreement, but it is also made clear in article 1.1 of the Agreement that they are not under any obligation to do so. The Preamble emphasizes the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures. Under the Dispute Settlement Understanding of the WTO ("DSU"), Governments are committed, if they wish to seek redress of a violation of a TRIPS obligation, to have recourse to, and abide by, the multilateral WTO dispute settlement procedures and not to make a determination that a violation has occurred except in accordance with these procedures and not to retaliate except in accordance with authorization from the WTO's Dispute Settlement Body (DSB).[6] The WTO dispute settlement system aims ensure a rule of law in international trade relations through the impartial and effective resolution of disputes between Governments.

Seeking the right balance

13. An objective of intellectual property protection is to promote long term public interest by means of providing exclusive rights to right holders for a limited duration of time.[7] After the

expiration of the term of protection, protected works and inventions fall into the public domain and anyone is free to use them without prior authorization by the right holder. Hence, in the long term there is no conflict but rather a mutually supportive relation between the interests of promoting creativity and innovation and maximizing access. However, during the course of the term of protection, there is potential for conflict between these two considerations, which can also mirror differences between the interests of right holders and users. The challenge of the national and international rule-maker is to find the optimal balance between various competing interests with a view to maximizing the public good, while meeting also the human rights of authors and inventors. Article 7 of the TRIPS Agreement emphasizes the need for balance: "the mutual advantage of producers and users of technological knowledge" and "a balance of rights and obligations". The tensions inherent between subparagraphs (a) and (b), on the one hand, and subparagraph (c) of article 15.1 of the ICESCR, on the other hand, are those that underlie also the considerations of balance in IP systems.[8]

14. An optimal balance within IP systems at the national or multilateral level can be reached by properly determining the definition of protectable subject matter, scope of rights, permissible limitations and term of protection. This balance is constantly developing both at the national and international level in response to economic and technological as well as political developments. The TRIPS Agreement is a minimum rights agreement that leaves a fair amount of leeway to member countries to implement its provisions within their own legal system and practice and fine-tune the balance in the light of domestic public policy considerations.[9] Below are a few remarks about the role of these four elements in determining the scope of IP protection.

15. An important part of the balance is a careful definition of protectable subject matter. For example, copyright protection does not cover any information or ideas contained in a work; it only protects the original way that such information or ideas have been expressed in a work.[10] As regards patents, the starting-point in the TRIPS Agreement is that for an invention to be patentable it must be new, involve an inventive step and be capable of industrial application.[11] For example, biological material in its natural state is not patentable. Furthermore, the Agreement recognizes the importance of ethical and other considerations by allowing a country, even where an invention meets the normal rules for patentability, to refuse to grant a patent if the commercial exploitation of the invention is prohibited on grounds of public order or morality, including if its exploitation might be dangerous to life or health or seriously prejudicial to the environment.[12] Diagnostic, therapeutic and surgical methods for the treatment of humans or animals may be excluded from patentability. In addition, the TRIPS Agreement provides for some special flexibility in the area of biotechnology, allowing members to refuse patents for plant and animal inventions (other than micro-organisms and microbiological processes). One condition is that, if patents are not available for new plant varieties, an alternative so-called "effective sui generis" system must be provided.[13] This provision of the TRIPS Agreement is presently being reviewed by the TRIPS Council.[14]

16. The Agreement does not define further the conditions for patentability, thus leaving member countries considerable discretion in this regard. A higher threshold for patentability limits the scope for patenting, but makes it more difficult for innovators to utilize the system, perhaps especially in developing countries. In regard to this threshold, a distinction should be made between the minimum requirements under the TRIPS Agreement and the practices of some member countries, which may go beyond what is required by the Agreement.

17. In the bioethics debate it is important not to confuse three distinct issues that may arise in relation to new technology. Of them, only the third one, relating to patentability, is an intellectual property issue, and Governments' freedom to act on the first two is not limited by obligations under the TRIPS Agreement:

- whether and, if so, subject to what conditions research into biotechnology should be allowed to take place;

- whether and, if so, subject to what conditions the results of research into biotechnology should be allowed to be exploited, for example through the commercialization of bioengineered crops;

- whether the inventor of a biotechnological invention should have the right to prevent other people from using his invention for a limited period of time.

18. A more general point that should be made is that the grant of an IP right does not impair the possibility for Governments to regulate production and the use and distribution of products on any public policy grounds, such as concerns about public order, morality, health or environment.[15] This is because a patent and other intellectual property right do not guarantee the right of the right holder to use the invention or other protected subject matter; they are only concerned with the right of the right holder to prevent others from doing so.

19. A key feature in achieving a proper balance in IP regimes is granting protection only for a limited period, which should be appropriately long to provide the necessary incentive and reward for creative work and innovation. After the expiration of the term of protection, the work or invention falls into the public domain, and everyone is free to use it without restriction. The fact that IP systems provide for a limited period of protection is an indication that in all such systems the protection of the rights of authors and inventors are not absolute but are balanced by considerations of public interest.[16]

20. The TRIPS Agreement provides a fair amount of leeway to member countries to adjust the level of protection by providing limitations and exceptions to exclusive rights. The Agreement contains general clauses that permit limitations and exceptions to exclusive rights, provided that they address specific situations, do not conflict with a normal exploitation of the protected material and do not unreasonably prejudice the legitimate interests of right holders.[17] In addition, the Agreement and the Conventions incorporated in it allow for numerous specific limitations and contain provisions on compulsory licences.

21. One of the basic objectives of the patent system is to facilitate the dissemination of technological knowledge by encouraging inventors to disclose new technology rather than attempt to keep it secret. Article 29.1 of the Agreement requires that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by others. The resulting information, which is stored and classified in patent documentation, is accessible to anyone, including to those in countries where a patent has not been sought. One of the purposes of this disclosure requirement together with the research or

experimental use exception that is typically found in national patent laws is to ensure that the technological and scientific knowledge contained in a patented invention can be used for further research already during the patent term.[18]

22. As noted above, copyright protection does not cover any information or ideas contained in a work; it only protects the original way that such information or ideas have been expressed in a work. Thus everyone is free to use the information contained in a work. In addition, the TRIPS Agreement and national copyright laws contain numerous specific limitations that allow free use of a work, including in regard, inter alia, to circulation of news and education.[19] An Appendix to the Berne Convention, also incorporated into the TRIPS Agreement, allows developing countries, under certain conditions, to grant compulsory licences for educational purposes.

23. The preoccupation in the TRIPS Agreement with balance is also reflected in the provisions concerning enforcement of intellectual property rights. While the Agreement requires that enforcement procedures must be such as to permit effective action, it also requires that they must be applied in a manner that avoids the creation of barriers to legitimate trade and safeguards against their abuse must be provided. Such procedures must be fair and equitable.[20]

24. An important part of IP policy is that Governments take appropriate measures in other areas of economic and social policy that enable the society to benefit from the IP system and to prevent its abuse. Article 8 of the TRIPS Agreement, entitled "Principles", recognizes that "members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement". It adds that "[a]ppropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology".[21]

25. Finding the right balance at the national level is often difficult. Agreeing a suitable framework for protection at the international level between countries with different political and economic systems and different levels of development is even harder. However, during the GATT Uruguay Round negotiations there was a widely held view that common rules with multilateral dispute resolution were preferable to a proliferation of bilateral disputes. These were negotiations in which all the sometimes conflicting public policy considerations that underlie the IP system entered into play. One of the ground rules agreed for the negotiations was that consideration would be given to the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.[22] In the negotiations compromises were made by negotiators on all sides.[23]

26. Rights under article 27.2 of the UDHR and article 15.1 (c) of the ICESCR together with other human rights will be best served, taking into account their interdependent nature, by reaching an optimal balance within the IP system and by other related policy responses. Human rights can be used - and have been and are currently being used - to argue in favour of balancing

the system either upwards or downwards by means of adjusting the existing rights or by creating new rights. Which way serves the best the objectives of human rights is at the end a matter of social and economic analysis and empirical evidence.

Patent protection for pharmaceutical products

27. The issue of patent protection for pharmaceutical products is one where the problem of finding a proper balance is particularly acute. On the one hand, it is especially important from a social and public health point of view that new drugs and vaccines to treat and prevent diseases are generated and the incentives provided by the patent system are particularly important in this regard. On the other hand, precisely because of the social value of the drugs so generated, there is strong pressure for such drugs to be as accessible as possible as quickly as possible.

28. The TRIPS Agreement represents an effort to find an appropriate balance between these considerations. On the one hand, the Agreement requires that, after the end of the relevant transition period, patent protection for pharmaceutical products should be available for a 20-year term of protection. On the other hand, the Agreement contains a substantial number of provisions which enable Governments to implement their intellectual property regimes in a manner which takes account of immediate as well as longer term public health considerations. These provisions, some of which have already been mentioned, include those relating to certain exemptions from patentability, the possibility to make limited exceptions to exclusive rights,[24] compulsory licensing, parallel importation and the recognition that member countries may adopt measures necessary to protect public health and nutrition (for example, many countries have price or reimbursement controls, generic substitution policies, etc.). These various provisions were the result of several years of hard negotiation and involved important concessions on the part of the major demandeurs for the TRIPS negotiations. They recognize and legitimize in public international law the right of countries to qualify patent rights in certain ways.

29. It is important to put the impact of the TRIPS Agreement on access to drugs in developing countries into perspective:

- Most developing countries have provided product patent protection for pharmaceuticals all along or have introduced it prior to the end of the transition period to which they are entitled under the TRIPS Agreement (2005 for developing countries and 2006 for least developed countries[25]). Only a handful of WTO members are using the full transition period.

- Most drugs, including most of those vital for essential health care in developing countries, are not under patent protection anywhere and are in the public domain.[26]

- In many of the poorest countries, for example in Sub-Saharan Africa, patents have not been sought and granted for drugs even where they are patentable under their national laws.

- The effective period of patent protection for pharmaceuticals that use new chemical entities is very much shorter than the nominal 20-year period, especially in developing countries, because of the time taken to obtain marketing approval from the public health authorities.

30. It should also be noted that the TRIPS Agreement does not stand in the way of prices for patented pharmaceuticals being modulated to take into account the capacity to pay of different countries and the populations within them. The WTO Secretariat is examining the issue of differential pricing in the context of its cooperation with the World Health Organization. The two Secretariats are jointly preparing a workshop of interested parties which would seek to examine the legal, institutional and political environment that would favour widespread use of differential pricing.

31. For the private sector to make a significant contribution to developing vaccines and drugs to treat the neglected diseases of the poor, patent protection is necessary. However, it is recognized that patent protection may not be sufficient in many cases where the purchasing power of those afflicted is low. Especially now that developing countries have committed themselves through the TRIPS Agreement to share some of the burden of providing incentives for research and development, it is more than ever important that, where necessary, the patent system is complemented with other forms of support from the international community for research and development into neglected diseases.

32. It should also be recalled that there is a strong relationship between trade, poverty and health. While improved health is good for development, development and the increased resources that it provides are vital for promoting public health. And the open trading system which the GATT/WTO has sought to establish, of which the TRIPS Agreement is an integral part, is vital for creating opportunities for development.

Traditional knowledge

33. The issue of protection of traditional knowledge is currently being discussed by the international community, including the TRIPS Council. One of the concerns that has been expressed relates to the patenting by foreigners of traditional knowledge. Under the principles contained in the TRIPS Agreement, this should not be possible. For something to be patentable under the TRIPS Agreement, it has to be an invention which includes meeting tests of novelty and inventive step, that is to say it must not be part of what patent officials refer to as "the prior art". Traditional knowledge clearly would not meet these tests. There have been cases where, improperly, patents have been granted for knowledge which turns out not to be new, but traditional. In such cases, patents can be, and have been, invalidated.

34. One of the practical problems that gives rise to such improper grants of patents is that much traditional knowledge is not recorded in databases that can be consulted by patent examiners when they decide whether to grant a patent. Efforts are being made, both at the national level and at the international level to remedy this problem by drawing up appropriate databases. One organization working on this is the World Intellectual Property Organization ("WIPO").

35. Another concern that has been raised, especially about indigenous peoples' traditional knowledge, is that the intellectual property system does not provide sufficient opportunities for the communities where the knowledge originated to protect it from use by others. This type of concern has also been expressed about other traditional cultural manifestations, such as folklore.

36. Of course, to some extent the existing intellectual property system can help in this regard, through its various fields, including the rights of authors and performers, trade marks, including certification marks, geographical indications, industrial designs, patents and trade secrets. This applies perhaps particularly with collective rights, such as geographical indications and collective and certification marks, but individual rights may also be of use.

37. Debate has begun as to whether the existing intellectual property system should be complemented with forms of protection more specifically directed to traditional knowledge, especially of indigenous and local communities. The study of these matters is underway in WIPO and proposals for action have been made also in the WTO. It is recognized that this issue gives rise to complex and difficult questions. For example, while some intellectual property rights are potentially indefinite in duration, such as trade marks and geographical indications, a key feature of the balance in the main intellectual property rights relating to creations and inventions is that, after a temporary period of protection, such creations or inventions fall into the public domain and become freely usable by mankind at large.

38. A related topic is IP and biodiversity, in particular the relationship between the TRIPS Agreement and provisions on these matters of the Convention on Biological Diversity ("CBD"). The TRIPS Agreement, which deals with intellectual property, is silent on the issues addressed in the CBD of the rights of countries to regulate access to biological resources in their territories on the basis of the principle of prior informed consent and of arrangements for benefit-sharing. This silence means that the TRIPS Agreement leaves Governments free to legislate in accordance with the requirements of the CBD on these matters.

Notes

[1] The TRIPS Agreement sets out the minimum standards of protection to be provided by each member by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention and the Berne Convention, must be complied with, and, secondly, by adding rules on certain matters where the pre-existing conventions are silent or were seen as being inadequate. Authors' moral rights conferred under article 6 bis of the Berne Convention were not incorporated into the TRIPS Agreement as not being trade-related. However, this does not affect the obligations of WTO members that are also parties to the Berne Convention to protect moral rights.

[2] These articles are closely inter-linked with the provisions of article 17 of the UDHR that provide that "[e]veryone has the right to own property alone as well as in association with others" and that "[n]o one shall be arbitrarily deprived of his property".

[3] See articles 3-5 of the TRIPS Agreement.

[4] See Part III of the TRIPS Agreement.

[5] See article 69 of the TRIPS Agreement.

[6] See article 23 of the DSU.

[7] For the sake of simplicity, the discussion in this Section is limited to copyright and patents. It should be noted that the social objectives and the means of accomplishing them are somewhat different as regards the protection of distinctive signs, such as trade marks and geographical indications.

[8] National and international IP laws also contain provisions that take into account the need to pursue policies that promote also other rights envisaged in the human rights instruments, such as the freedom of expression.

[9] See article 1.1 of the TRIPS Agreement.

[10] See article 9.2 of the TRIPS Agreement.

[11] See article 27.1 of the TRIPS Agreement.

[12] See article 27.2 of the TRIPS Agreement.

[13] Such a system offers greater flexibility than a patent. For example, countries which have such plant variety protection frequently allow so-called "farmers' privilege" by which farmers can resow on their own land protected varieties they have grown without having to buy new seed each year and a breeders' exemption, which ensures that, as a rule, protected plant varieties can be freely used for further breeding practices.

[14] See article 27.3 of the Agreement.

[15] This is explicitly stated in article 17 of the Berne Convention, which is incorporated into the TRIPS Agreement.

[16] However, it might be noted that in the discussion on traditional knowledge a concern is sometimes expressed about the time-limited nature of intellectual property rights.

[17] See articles 13, 17, 26.2 and 30. There are some differences between the wording of these articles.

[18] The scope of the experimental or research use exception provided for in article 30, dealing with patents, was the subject of a recent WTO panel report (Canada - Patent Protection for Pharmaceutical Products). The Panel decided that article 30 covered a provision of Canadian law which permits the use by generic producers of patented products, without authorization and prior to the expiry of the patent term, for the purposes of seeking regulatory approval from public health authorities for the marketing of their generic version as soon as the patent expires (sometimes referred to as the "regulatory exception" or as a "Bolar" provision). See document WT/DS114/R.

[19] Such exceptions are contained in the provisions of the Berne Convention that have been incorporated into the TRIPS Agreement. They include reproduction in certain special cases (art. 9 (2)), quotations and use of works by way of illustration for teaching purposes (art. 10), reproduction of newspaper or similar articles and use of works for the purpose of reporting current events (art. 10 bis), and ephemeral recordings (art. 11 bis (3)).

[20] See article 41 of the TRIPS Agreement.

[21] In addition, article 40 of the TRIPS Agreement recognizes that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. Member countries may adopt, consistently with other provisions of the Agreement, appropriate measures to prevent or control practices in the licensing of intellectual property rights which are abusive and anti-competitive. The article provides for a mechanism whereby a country seeking to take action against such practices involving the companies of another member country can enter into consultations with that other member to seek its cooperation through the supply of information of relevance to the matter in question.

[22] This was decided in the mid-term review of the Uruguay Round negotiations, completed in April 1989, and is reflected in the fifth recital of the Preamble to the Agreement.

[23] For example, a short list of the main areas in which some major demandeurs made important compromises in the patent and related areas alone would include the rules on the patentability of plants and animal inventions, compulsory licensing, exhaustion and parallel importation, transitional periods and test data protection.

[24] As mentioned above, a recent WTO panel referred to above (WT/DS114/R) upheld the consistency with this provision of the "regulatory exception" in Canadian patent law, which enables generic pharmaceutical producers to use a patented drug without authorization from the patent owner and during the term of the patent for the purposes of obtaining regulatory approval for their generic version. If such an exception to patent rights was not permissible, the arrival on the market of generic competitors would be delayed by some years.

[25] See articles 65.2, 65.4 and 66.1.

[26] The fact that these drugs and other interventions are far from fully exploited in many developing countries indicates that national and international efforts to improve financing, distribution and healthcare infrastructure are vital.

ANNEX

The Main Features of the TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement") is contained in Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") of 15 April 1994, which entered into force on 1 January 1995. The Agreement aims to ensure the adequate protection and effective enforcement of intellectual property rights and the impartial resolution of disputes between WTO members about such matters, to the mutual advantage of both producers and users of intellectual property.

The areas of intellectual property that the TRIPS Agreement covers are: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trade marks including service marks; geographical indications; industrial designs; patents, including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information, including trade secrets and test data.

In respect of each of these areas of intellectual property, the Agreement sets out the minimum standards of protection to be provided by each member. Each of the main elements of protection is defined, namely the subject matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The standards build on those in the main pre-existing WIPO Conventions, substantive provisions of which are incorporated into the Agreement by reference.

The second main set of provisions in the Agreement lays down requirements for national procedures and remedies for the enforcement of these intellectual property rights (IPRs): general principles applicable to all IPR enforcement procedures; civil and administrative procedures and remedies; provisional measures; special border enforcement measures; and criminal procedures. These procedures and remedies must enable right holders to enforce their rights effectively and also provide for safeguards against the abuse of such procedures and remedies as barriers to legitimate trade.

The Agreement makes disputes between WTO members about the respect of TRIPS obligations subject to the WTO's integrated dispute settlement procedures.

In addition, the Agreement provides for certain basic principles, such as national and most-favoured-nation treatment, and some general rules to ensure that procedural difficulties in acquiring or maintaining IPRs do not nullify the substantive benefits that should flow from the Agreement.

The TRIPS Agreement is an integral part of the WTO Agreement, and it is binding on each member of the WTO from the date the WTO Agreement becomes effective for it. However, the TRIPS Agreement gives members transitional periods, which differ according to

their stage of development, to bring themselves into compliance with its rules. Subject to certain exceptions, developing countries had to implement TRIPS as of the beginning of the year 2000. Least-developed country members may delay the application until the year 2006.

The Agreement is administered by the Council for TRIPS, open to all members, which reports to the WTO General Council.

Further information on the TRIPS Agreement and the work of the TRIPS Council can be found on the WTO Web site at http://www.wto.org (go to the "A-Z list" and click on "Intellectual property").

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Item 3 of the provisional agenda

IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON
ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Day of General Discussion "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Article 15.1(c) of the Covenant)" organized in cooperation with the World Intellectual Property Organization (WIPO)

Monday, 27 November 2000

INTELLECTUAL PROPERTY AND HUMAN RIGHTS

WORKING DRAFT

Presentation by Mr. Wend Wendland, Senior Legal Officer, Global Intellectual Property Issues Division, World Intellectual Property Organization.[1]

[1] This document does not necessarily reflect the views of the Member States of the World Intellectual Property Organization.

I. Introduction

1. The World Intellectual Property Organization (WIPO) welcomes the decision of the Committee on Economic, Social and Cultural Rights (the CESCR) to organize a Day of General Discussion on Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (the Covenant). WIPO willingly, at the request of the Office of the High Commissioner for Human Rights (OHCHR) and the CESCR, agreed to cooperate in organizing the Discussion. WIPO's contribution was to assist the CESCR in publicizing this Discussion within the intellectual property (IP) community. WIPO looks forward to the opportunity to participate in and contribute information on IP to this Discussion and to subsequent meetings and events concerning IP and human rights.

2. The globalization of markets and regulation, rapid advances in new technology (biotechnology and information technology) and the growing value of intellectual commodities as central assets in a knowledge-based society accentuate the importance of IP and its relevance in other policy areas. These areas include food and agriculture, biological diversity and the environment, biotechnology innovation and regulation, health care, human rights, indigenous peoples' rights, cultural policies and trade and development.

3. The heightened visibility of IP leads to increased scrutiny of the adequacy of current IP laws, policies and procedures. A continuous examination and appraisal of the IP system – and of its role in a broader developmental context – is healthy and ultimately strengthens the system. However, discussions concerning the role of IP in other policy areas are sometimes based upon misunderstandings and are thus confused and incomplete. One of the reasons is that relevant constituencies at the national and international levels do not yet communicate effectively with each other. As a result, policymakers responsible for food and agriculture, biological diversity and the environment, health, human rights, and the other areas mentioned above, are not yet familiar with the perspectives of their counterparts responsible for IP, and *vice versa*. In addition, concerns with IP are sometimes proxies for larger political, economic, social and cultural concerns that are not necessarily IP-related. In these cases, the debates are more ideological than technical and practical.

4. WIPO encourages and supports discussions between different constituencies (such as the IP and human rights communities) that are balanced and based upon accurate and technical information about IP. The relationship between intellectual property and human rights is complex, dynamic and at times ambiguous – in particular cases, IP and human rights principles may either complement or compete with each other. What is needed are theories, frameworks and, above all, practical tools that assist the IP and human rights communities to better comprehend and manage this relationship.

5. WIPO has found the Discussion Paper prepared for this meeting (Document E/C.12/1998/12) (the Discussion Paper) very interesting and useful, and addresses below certain of the points it makes. WIPO does, however, not comment on all aspects of the Discussion Paper.

6. With this introduction, Section II of this paper describes, briefly, the mandate and activities of WIPO. Section III identifies the main elements of the IP system, with particular

attention to certain aspects relevant to the relationship between IP and human rights. Section IV comprises more general observations on the relationship between IP and human rights, and Section V a conclusion.

II. The Mandate and Activities of WIPO

7. WIPO is one of the specialized agencies of the United Nations (UN) system of organizations. WIPO's mandate is the promotion of the protection of IP throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization.[2]

8. WIPO has currently 175 Member States. WIPO's headquarters are in Geneva, Switzerland. WIPO's main activities include:

- facilitating the conclusion of new international treaties and the modernization of national legislation;
- administration of more than twenty international treaties in the fields of copyright, related rights, patents, industrial designs and marks;
- providing technical advice and assistance to developing countries as part of an extensive development cooperation program;
- the assembly and assimilation of information and advice to a diverse range of parties; and,
- the maintenance of services for facilitating the obtaining of protection of inventions, marks and industrial designs for which protection in several countries is desired, such as the Patent Cooperation Treaty, 1970, the Hague Agreement Concerning the International Deposit of Industrial Designs, 1925, and the Madrid Agreement Concerning the International Registration of Marks, 1891, and the Protocol Relating to that Agreement, 1989.

9. WIPO has in recent years initiated several new programs of activities on, for example, the protection of traditional knowledge and the IP aspects of the preservation, conservation and dissemination of biological diversity, including of access to and benefit-sharing in genetic resources; the specific needs and interests of least-developed countries (LDCs); and, the intellectual property needs of small and medium-sized enterprises (SMEs).

10. Many of the international treaties administered by WIPO set out internationally agreed minimum rights and standards in the various fields of IP. These treaties have been negotiated and adopted by WIPO's Member States. Intellectual property rights (IPRs) are limited territorially and can only be exercised within the jurisdiction of a country granting these rights. With the increasing interdependency of countries, membership of the treaties makes it possible for each member country to agree to grant to nationals of other countries in the union the same protection as they grant to their own nationals as well as to follow certain common

[2] Article 3(i), Convention Establishing the World Intellectual Property Organization, 1967. The Convention entered into force in 1970.

rules, standards and practices. Certain of the treaties (such as the Patent Cooperation Treaty, 1970) establish mechanisms whereby protection can be obtained in several countries (the so-called "global protection treaties").

III. Intellectual Property: Main Elements

Basic Concepts

11. "Intellectual property" refers to property rights in creations of the mind, such as inventions, industrial designs, literary and artistic works, symbols, and names and images. The notion "intellectual property" is defined in the Convention Establishing the World Intellectual Property Organization (WIPO), 1967[3] to include rights relating to:

- literary, artistic and scientific works;
- performances of performing artists, sound recordings and broadcasts;
- inventions in all fields of human endeavor;
- scientific discoveries;
- industrial designs;
- trademarks, service marks, and commercial names and designations;
- protection against unfair competition; and,
- all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

12. IP is generally divided into two main categories:

- The protection of **industrial property** has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, geographical indications (indications of source or appellations of origin), and the repression of unfair competition.[4]

- **Copyright** includes literary and artistic works, such as novels, poems and plays, films, musical works, and drawings, paintings, photographs and sculptures, computer software, databases, and architectural designs. **Related rights** (also referred to as "neighboring rights") include the rights of performing artists in their performances, producers of sound recordings in their sound recordings, and those of broadcasters in their radio and television broadcasts.

13. As the definition in the WIPO Convention indicates, "intellectual property" is not confined to the specific examples of IP just mentioned. The phrase at the end of the definition in the WIPO Convention ("all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields") makes it clear that "intellectual property" is a broad concept and can include productions and matter not forming part of the existing categories of

[3] Article 2 (viii).

[4] Article 1.2, Paris Convention for the Protection of Industrial Property, 1883. The Paris Convention has been updated and amended several times since 1883, most recently in 1967.

IP, provided they result from intellectual activity in the industrial, scientific, literary or artistic fields.

14. Additionally, **plant varieties** qualify for protection in many countries under the *sui generis*, IP-related system of plant breeders' rights. The International Convention for the Protection of New Varieties of Plants, 1991 (the UPOV Convention) provides international standards for the protection of plant varieties. The International Union for the Protection of New Varieties of Plants (UPOV), which is based in Geneva, administers the UPOV Convention.

Objectives of IP Protection

15. The primary purpose of most branches of the IP system (excluding trademarks and geographical indications[5]) is to promote and protect human intellectual creativity and innovation. IP law and policy does so by striking a careful balance between the rights and interests of innovators and creators, on the one hand, and of the public at large, on the other. Thus, by granting exclusive rights in an invention, for example, the IP system establishes incentives for further innovation, rewards creative effort, and protects the (often substantial) investment necessary to make and commercialize the invention. The public interest is served because a broader range of innovative and creative products are generated and made available.[6]

16. Thus, in relation to pharmaceutical products, for example, the Director General of the World Health Organization (WHO), Dr. Gro Harlem Brundtland, has stated:

> *"[T]o develop new drugs we need an innovative pharmaceutical industry, with appropriate incentives for innovation and protection of intellectual property rights. Experience demonstrates that protection of intellectual property rights goes hand-in-hand with successful research and development."*[7]

17. **The Disclosure and Dissemination of Information:** The patent system encourages people to disclose inventions, rather than retain them as trade secrets, thus enriching the store of publicly-available knowledge and promoting further innovation by other inventors. In fact, disclosure of the invention is one of the requirements for obtaining a patent, the others being that the invention is novel, involves an inventive step (non-obviousness) and is industrially useful. Exclusive rights are granted in return for a wide dissemination of the results of inventiveness and creativity, while society at large benefits because the protected productions can then be used as a basis for further creative and inventive work.

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[5] The protection of trademarks and geographical indications is aimed at the protection of the goodwill and reputation of tradespersons and their products and to prevent the unauthorized use of such signs which is likely to mislead consumers.

[6] IP protection is, however, only one of the conditions necessary for further innovation and creation. At the national level, various other factors may also be necessary, such as investor security, access to capital, a suitable regulatory environment, and appropriate tax incentives.

[7] *"Globalization and Access to Drugs: Perspectives on the WTO/TRIPS Agreement"* (Health, Economics and Drugs DAP Series, No. 7), World Health Organization, 1999, p.67.

18. More recently, information technology has enhanced the availability of patent information – for example, information on recent and current patents granted by the Canadian Intellectual Property Office, the United States Patent and Trademark Office, the European Patent Office and the Japanese Patent Office is available on-line, generally free of charge. The WIPO "Intellectual Property Digital Libraries (IPDLs)" Project aims to facilitate access to and exchange of IP information by the IP community worldwide. Access by developing countries to this information could be a tool for technology transfer and economic development to the benefit of these countries and their inventors, industry, universities, and research and development institutions. In implementing this project, WIPO will take advantage of the global digital information network being developed and established by WIPO (known as the WIPONet project).

19. Thus, public dissemination of patent information is an important IP objective. Copyright and other IP branches work in a similar way. The progress and well-being of humanity rests on its capacity for new creations in areas of technology and culture. The promotion and protection of IP can also spur economic growth, create new jobs and industries, and enhance the quality and enjoyment of life.

The Nature of Intellectual Property Rights

20. IP rights generally comprise exclusive rights to prevent or authorize the reproduction, adaptation, use, sale, importation and other forms of exploitation of the creation or innovation that is the subject of the rights. In some cases, an IP right may not be an exclusive right, but may rather comprise the right to claim a reasonable remuneration upon the exercise by a third party of any of the acts referred to.

21. Almost all IP rights are limited in term. The term of copyright is generally 50 years following the author's death. Patents are generally valid for 20 years from the date of filing the application. In reality, however, patents are normally granted some time after the application, with the result that most patents are effective for no longer than 16 or 17 years at the most. In a number of cases, especially where marketing approvals are needed, patent terms are often not longer than 10 years.

22. **IP rights are "negative rights"**: IP rights are "negative rights", in the sense that they allow the rightholder to prevent the unauthorized exercise of his or her rights. In the case of patents, for example, the grant of a patent over a particular technology does not of itself permit or sanction its commercialization and use. The patent simply allows the patentee to prevent others from using the invention without his or her permission. The patent does not constitute a "positive right" to perform the patented invention. Other laws, such as those for the protection of safety and security, the environment and human or animal health, may constrain the use to which the patentee may put the invention. Such constraints include, for example, the requirement in many countries that marketing approval be obtained from a health ministry for pharmaceutical products.

23. It is sometimes suggested that IP law should be held responsible for preventing the making available of products that may be harmful or undesirable.[8] However, the patenting or the exclusion from patenting will not in and of itself cause or prevent the invention of new products or processes, nor their commercialization. To discourage or prevent the invention of new products or processes that are deemed undesirable for one reason or another, an explicit ban or restriction would need to be put in place by the relevant domestic laws.

24. In short, it is the existence and use of the technologies that is the issue, and not their patentability. The absence of patent protection would not necessarily prevent the commercialization of undesirable products; on the contrary, the absence of IP protection may even encourage their wider dissemination.

Limitations and Exceptions

25. All IP rights are subject to various exceptions and limitations, and in some cases compulsory (non-voluntary) licenses, tools which can be used to strike the right balance between the rights of creators and users. For the purpose of achieving the public policy goals of IP, the possibility of imposing limitations on IPRs can be an important tool in the hands of national lawmakers. We will return to this important point below.

Constant Evolution

26. Another feature of the IP system is that it is in constant evolution. New advances in technology – information technology and biotechnology particularly – and changes in economic, social and cultural conditions require continuous appraisal of the system and at times adjustment and expansion, accompanied often by controversy. For example, the last few decades have seen the recognition of new forms of IP, such as a *sui generis* form of protection for plant varieties (in the 1950s and 1960s), patent protection for modified biological material, plants and animals (in the 1970s and 1980s), a *sui generis* form of protection for layout designs (topographies) of integrated circuits (1980s), copyright protection for computer software (1980s) and protection for databases and compilations of data (1980s and 1990s).

27. The possible protection of tradition-based innovations and creations by the IP system is a more recently articulated question. This question is also referred to several times in the Discussion Paper.[9] Existing IP laws and procedures may not adequately meet the needs of all traditional innovators and creators. This may be so for various legal and practical reasons. The reciprocal relationships IP and access to genetic resources, the protection of biotechnological inventions and the preservation, conservation and dissemination of biological diversity, are yet further, and related, areas meriting attention.

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[8] For example: *"States Parties should develop an adequate process of review to anticipate potential harmful effects resulting from the patenting of specific products and processes and to deny IP protection to these items. Many technologies, such as the widespread production of toxic chemical substances and the genetic revolution, pose substantial risks as well as potential benefits."* (Discussion paper page 13.

[9] Discussion Paper, pages 11, 19 and 22 to 23.

28. These issues are complex, however. Discussions concerning intellectual property, traditional knowledge and genetic resources are sometimes based upon misunderstandings. These issues merit exploration based upon a fine-grained and technical understanding of the nature and role of IP.

29. For example, the IP system is often criticized for recognizing only single owners of rights and therefore failing to accommodate the collective rights of communities or other groups of individuals, particularly in the field of traditional knowledge (TK).[10] However, the fact-finding missions and other activities of WIPO (see below) indicate that the reality is more complicated than these generalizations suggest. First, not all TK is collective. While it is true that many indigenous and local community cultures generate and transmit knowledge from generation to generation collectively, in some cases individuals can distinguish themselves and are recognized as informal creators or inventors separate from the community.[11] Similarly, not all IPRs are individualistic. Increasingly, invention and creation take place in firms where groups of persons may be cited as co-inventors or co-authors, concepts recognized by the IP system. Trademark law recognizes "collective marks" and geographical indications also protect the interests of a collective. Additionally, the collective management of IPRs is very familiar to the music industry, where copyright in musical works has been successfully managed in this way for many years.

30. In recognition of the importance of these matters, in 1998 WIPO's Member States mandated a new exploratory program on the reciprocal and dynamic relationships between IP and tradition-based innovation and creation, and the preservation, conservation and dissemination of global biological diversity. In 1998 and 1999, WIPO *inter alia* undertook nine fact-finding missions (FFMs) to 28 countries to learn about the needs and expectations of TK holders (such as indigenous peoples and local communities) in relation to the protection of their TK. The information gathered during these FFMs has been published by WIPO in the form of a draft Report *"Intellectual Property Needs and Expectations of Traditional Knowledge Holders: World Intellectual Property Organization (WIPO) Draft Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)"*. This Report has been available for public comment since July 7, 2000. The commenting period closes on December 15, 2000, after which a final Report will be issued. Other activities during 1998 and 1999 included two Roundtables in Geneva; four regional consultations on folklore, organized with the United Nations Educational, Social and Cultural Organization (UNESCO), in South Africa, Viet Nam, Tunisia and Ecuador; and, with the United Nations Environment Programme (UNEP), the commissioning of studies on *"The Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of*

[10] For example, the Discussion Paper, page 11.

[11] Statement by Anil Gupta, Indian Institute of Management, Ahmedabad, India, at WIPO Roundtable on Intellectual Property and Traditional Knowledge, Geneva, November 1 and 2, 1999. See also Downes, D., *"Using Intellectual Property as a Tool to Protect Traditional Knowledge: Recommendations for Next Steps"*, Draft CIEL Discussion Paper prepared for the Convention on Biological Diversity Workshop on Traditional Knowledge, November 1997, p. 3; Chand *et al*, *"Contracts for 'Compensating' Creativity: Framework for Using Market and Non-Market Instruments for Rewarding Grassroots Creativity and Inrovation"*, paper prepared for Forum Belem: Paths of Sustainable Development, November 1996; and, "Traditional Knowledge: A Holder's Practical Perspective", Varma Shri Sundaram, SRISTI, paper presented at WIPO Roundtable on Intellectual Property and Traditional Knowledge, Geneva, November 1 and 2, 1999.

Biological Resources and Associated Traditional Knowledge".

31. Most recently, the Member States of WIPO have established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.[12] This Committee, which will comprise WIPO's Member States, will meet for the first time in Spring 2001 in Geneva. Intergovernmental organizations and accredited international and regional non-governmental organizations will be able to participate as observers.

32. WIPO can provide further information on its activities, intellectual property in general and on the particular projects, programs and activities mentioned above. Such information is also available on WIPO's website at <www.wipo.int> For more information on WIPO's work thus far on the relationship between IP, traditional knowledge and genetic resources, please see <www.wipo.int/traditionalknowledge> and <www.wipo.int/biotech> Copies of the draft Report on the FFMs and the WIPO/UNEP case-studies can be obtained, free of charge, from WIPO.

[12] Assemblies of the Member States of WIPO (September 25 to October 3, 2000).

IV. Intellectual Property and Human Rights – Certain Observations

33. We have already noted the growing relevance of IP in other policy areas. IP issues are also relevant to human rights, and *vice versa*. As the Discussion Paper puts it:

> *"Moreover, the very centrality of intellectual property to almost every sphere of economic life means that international treaties, national legal codes, and judicial decisions about intellectual property can have significant ramifications for the protection and promotion of other human rights. This is particularly the case for the economic, social, and cultural rights enumerated in the Covenant."*[13]

34. Yet, the relationship between IP and human rights has received little attention. It was in recognition hereof that WIPO, in cooperation with the OHCHR, organized the successful Panel Discussion on Intellectual Property and Human Rights on November 9, 1998.[14]

35. Article 15 of the Covenant protects both the human right of authors to benefit from the moral and material interests resulting from their literary, artistic and scientific productions,[15] and the right of the public to have access to productions protected by the author's right.[16] The two rights are formulated and juxtaposed in a similar way in the Universal Declaration of Human Rights, 1948 (UDHR).[17]

36. The right to use and diffusion of information – the freedom "to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits" – and the right to protect the creators of information – the "moral and material interests resulting from any scientific, literary or artistic production of which he is the author" – may at once be both complementary and competing. Realization of the former rights may depend upon the promotion and protection of the latter rights; on the other hand, exercise of the latter rights may, in certain circumstances, appear to hinder or frustrate realization of the former rights.

37. This tension is, however, the antechamber to a larger debate on the relationship between IP and the realization and promotion of other human rights in the CESCR and the UDHR, such as the rights to health, adequate food and education.

38. Resolving tensions and striking balances is, however, not unfamiliar to the IP system. As mentioned earlier in this paper, all IP rights are subject to various exceptions and limitations, and in some cases compulsory (non-voluntary) licenses, tools which can be used to strike the right balance between the rights of creators and users. These limitations can

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[13] Discussion Paper, page 2 bottom.

[14] The proceedings of the Panel Discussion have been published as Intellectual Property and Human Rights, World Intellectual Property Organization, 1999.

[15] Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights, 1966: *(Everyone has the) "right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."*

[16] Article 15.1 (a) and (b).

[17] Articles 27.1 and 2.

resolve tensions internally to intellectual property and externally to other systems – such as human rights.

39. International IP standards provide for legal measures that may be adopted in national laws to balance the rights and interests of rightsholders and the public. These measures permit national authorities to craft their IP laws in line with their respective economic, social, technological and cultural developmental goals.

40. For example, in the field of patents, these measures enable national laws to exclude from patentability what would otherwise be patentable subject-matter or to restrict patent rights, on grounds such as the protection of human, animal or plant life and health, prejudice to the environment, morality and the *ordre public*.[18]

41. More generally, Article 8 of the TRIPS Agreement provides that:

> *1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.*
>
> *2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."*

42. In addition, national laws can authorize compulsory licensing under certain conditions (as set out in Article 31 of the TRIPS Agreement) and measures can be adopted to control anti-competitive practices in contractual licenses (see Article 40 of the TRIPS Agreement).

43. However, these are enabling provisions only, and their precise scope, meaning and effect in practice are subject to the interpretation and implementation of national law-makers.

44. The possibilities created by the provisions are not, however, unlimited and should not be interpreted so broadly as to negate the underlying fundamental goals and advantages of the IP system. The patent system, for example, encourages people to invent. By granting exclusive rights in an invention for a limited period of time, people, in particular those engaged in commercial enterprises, are more willing to invest in the resources necessary to

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[18] See for example Article 27.2 of the TRIPS Agreement: *"Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law."*

make and commercialize the inventions. The patent system also encourages people to disclose inventions, rather than retain them as trade secrets. It should also be borne in mind that new inventions, by definition, do not take away from the public what the public already had. Inventions have to be new, which means different from what was before.

45. Similarly, in the field of copyright, national legislators may take advantage of certain exceptions and limitations to achieve national goals and objectives. Once again, these exceptions and limitations are, however, not designed to undermine the fundamental principles of the copyright system.

46. All human rights are interdependent and indivisible. As has been noted:

> *The notion of interdependence and indivisibility of all human rights constitutes a fundamental principle, in the field of the promotion and protection of human rights in the framework of the United Nations.*[19]

47. The Vienna Declaration and Programme of Action, adopted during the Second World Conference on Human Rights in 1993, expressly mentions that:

> *All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.*[20]

48. Thus, to the extent that there may be conflicts between IP decisions and the imperatives of other human rights (whether those identified in Articles 27 and 15 of the UDHR and the Covenant respectively, or the human rights spelled out in other articles), a balance must be struck that treats both sets of imperatives fairly, equally, on the same footing and with the same emphasis.

49. Tensions between various human rights are not uncommon and balances of this nature must be struck all the time. For example, tensions between the rights to freedom of speech and the rights to privacy and to dignity are well known.

50. Thus, IP laws do not vest authors and inventors with absolute and unrestricted rights, as is sometimes suggested. For example, the Resolution passed by the Sub-Commission on the Promotion and Protection of Human Rights on August 17, 2000 (E/CN.4/Sub.2/2000/7) affirms that IP is a human right "*subject to limitations in the public interest*" (substantive paragraph 1). Such statements appear to pass over the complementarity of interests that authors/inventors and the wider public have in an IP system and the system's built-in limitations, exceptions and tools that can be used to find the right balance.

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[19] Arambulo, K. Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights (Intersentia Publishers, Antwerp, 1999), p. 100.

[20] UN Doc. A/CONF.157/23, Vienna Declaration and Programme of Action, par. 5 (p.5), quoted in Arambulo, *op. cit.* p. 112.

51. Of course, there may always be legitimate disagreements over what constitutes the "right balance". As to what is the right balance, much depends upon one's perspective. Just as with a "clash" between, for example, the rights to freedom of speech and to privacy, there is often no single right answer, but as many perspectives as there are affected constituencies. Implicit within the notion of "balance" is a compromise in which as many competing interests as possible are satisfied as far as possible. The IP system allows lawmakers certain flexibilities and options to meet their respective developmental goals, and is so doing the opportunity to strike the right balance.

V. Conclusions

52. The more IP becomes central to economic growth and wealth creation, the greater will be the challenge of developing the international IP system in a way that it be instrumental to social, economic, technological and cultural development of all the world's peoples.

53. The relationship between intellectual property and human rights is complex, dynamic and ambiguous. Theories, conceptual frameworks and, above all, practical tools to assist the IP and human rights communities to better comprehend and manage this relationship are necessary. Improving the provision of technical and accurate information on IP and its effects, and increased dialogue and cooperation between the IP and human rights communities are possible ways forward. So too is the examination of these issues with reference to specific and concrete cases, rather than on a general and ideological plane.

54. As Peter Drahos put it:[21]

> *Ideally the human rights community and the intellectual property community should begin a dialogue. The two communities have a great deal to learn from each other. Viewing intellectual property through the prism of human rights discourse will encourage us to think about ways in which the property mechanism might be reshaped to include interests and needs that it currently does not. Intellectual property experts can bring to the aspiration of human rights discourse regulatory specificity. At some point the diffuse principles that ground human rights claims to new forms of intellectual property will have to be made concrete in the world through models of regulation. These models will have to operate in a world of great cultural diversity. Moreover, the politics of culture is deeply factional, globally, regionally and locally. It is in this world that the practical issues of ownership, use, access, exploitation and duration of new intellectual property forms will have to be decided. It is here that intellectual property experts can make a contribution.*

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[21] Drahos, P. "The Universality of Intellectual Property Rights: Origins and Development" in Intellectual Property and Human Rights (WIPO, 1999), p. 34.

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IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Day of General Discussion "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15.1 (c) of the Covenant)" organized in cooperation with the World Intellectual Property Organization (WIPO)

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Economic, Social and Cultural Rights and WTO Work on Intellectual Property Rights - Current Processes and Opportunities

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1. The new international regime on Intellectual Property Rights administered by the World Trade Organization (WTO) is increasingly preoccupying the international human rights community. Indeed, the WTO agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs agreement) contains provisions which, depending on how they are interpreted and implemented, can conflict with legally binding international human rights norms, in particular articles 2 (1) and (2), 11, 12 and 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1] Of particular concern are the impacts of the TRIPs Agreement on the right to health (because it may restrict access to essential drugs at a low price), on indigenous rights (as traditional knowledge and community rights may be adversely affected by the requirement to provide some form of intellectual property protection on new plant varieties), and on the right to food (if plant varieties are patented it could restrict access to seeds and other agricultural products necessary for food production).

2. This paper seeks to analyse ways in which the Committee on Economic, Social and Cultural Rights (Committee) can usefully intervene in the current processes under way in the international trade arena relating to intellectual property, in order to ensure that trade rules or their implementation do not violate article 15 of the ICESCR or other rights of the Covenant that are affected by intellectual property law. This paper will argue that there is scope for the Committee and other human rights groups to intervene in a meaningful way in current WTO discussions on intellectual property, and to ensure that as they progress, these discussions take WTO members' commitments in the field of human rights into account. This paper will also argue that the Committee on Economic, Social and Cultural Rights is particularly well equipped to play the role of counterweight to WTO-mandated intellectual property protection obligations, for instance at the country level, through its process of examination of States' periodic reports.

3. To clarify what permits this conclusion to be reached, this paper will first set out what the WTO is and how it works. It will then describe the human rights-related intellectual property discussions currently under way in the WTO, and then highlight some ways the Committee might choose to pursue these issues.

The WTO - what it is and how it works

Background

4. The WTO was created in 1995 with the aim of ensuring predictability and stability in international trade, reducing existing barriers to trade and preventing new ones from developing, in order inter alia, "to raise standards of living and ensure full employment."[2] The WTO Preamble also recognizes the objective of sustainable development.

5. The term "WTO" may be used to refer to any of four distinct things: (1) the WTO Agreement, (2) the WTO as a multilateral "Member-driven" Organization, (3) the WTO Secretariat, and (4) the WTO Dispute Settlement Mechanism. This distinction is emphasized here as confusion or failure to distinguish between these four different aspects of the WTO often leads to misperception or misrepresentation of its structure, functions and power, and this in turn has led to erroneously directed policy action or recommendations.

6. **The WTO Agreement**: The term "WTO Agreement" is used to refer to the package of over 40 agreements and interpretative Understandings and Decisions that were adopted as a single undertaking at the conclusion of the "Uruguay Round" of multilateral trade negotiations, in 1994.[3] All members of the WTO are bound by all these agreements, which include the Agreement on Trade-Related Intellectual Property Rights (TRIPs Agreement).[4] The WTO's Dispute Settlement Mechanism applies to all of the agreements that make up the WTO Agreement.

7. **The WTO, the Organization**: As an organization, the WTO's functions are to oversee and facilitate implementation of the WTO Agreement. The WTO also serves as a forum for further multilateral trade negotiations, and administers the WTO's Dispute Settlement Mechanism. The WTO is a "Member-driven" organization, meaning that any policy decisions or initiatives come from its members, rather than the Secretariat. Also, all WTO members can participate in the WTO Councils and Committees.[5] There are no smaller "Executive Body"-type bodies in the WTO as there are in the United Nations - in other words, all WTO decisions are taken by all of its members. The Ministerial Conference, which meets at least every two years, is the WTO's Governing Body, setting strategic direction and making all final decisions. The WTO's General Council is the body responsible for overseeing the WTO's day-to-day business and management.[6]

8. One of the WTO's functions - overseeing and implementing the WTO Agreement - is carried out through the Trade Policy Review Mechanism (TPRM). The TPRM in some ways resembles human rights and other international supervisory mechanisms as it is based on reports that each WTO member must periodically submit describing its trade policies. The WTO Trade Policy Review is based on this report and on a report prepared by the WTO Secretariat. The TPRM's objective is to examine the impact of members' trade policies and practices on the trading system, and to contribute to improved adherence to WTO rules through greater transparency. The approach is not supposed to be legalistic, and consistency with WTO obligations is not the focus: rather, the focus is on transparency and the general impact of the trade policies, both on the country being examined and on its trading partners.[7]

9. **The WTO Secretariat**: The WTO's Secretariat in Geneva is relatively small, with a staff of 500, and a budget of 127 million Swiss Francs for 2000. The WTO Secretariat officially only provides administrative and technical support for the WTO and its members and does not have the power to propose new initiatives or policies, or to elaborate on existing rules - the member-driven nature of the WTO means that only WTO members can do so.

10. **The Dispute Settlement Mechanism**: One of the key features of the WTO is its Dispute Settlement Mechanism (DSM), which is today one of the most effective international judicial bodies. The DSM provides a binding dispute settlement procedure, and sets out clearly defined time limits for each stage of a dispute's adjudication. A three-person panel hands down decisions on disputes brought to the DSM. Either party to the dispute can then appeal the panel's ruling - appeals are heard by three of the WTO's seven-member standing Appellate Body. Importantly, the DSM allows the complainant WTO member(s) to impose trade sanctions (referred to as "compensation and suspension of concessions") against the member who has not complied with a dispute settlement ruling in the complainant's favour.[8]

Criticisms

11. The WTO has come under criticism, particularly by environmental, labour, and human rights groups, for three main reasons: the WTO is untransparent and undemocratic; the WTO favours trade objectives over social objectives such as environmental protection, public health or protection of human rights; and the WTO favours the powerful at the expense of the weak. All of these three criticisms have their validity, and human rights groups can play a significant role in addressing these especially if they do so with a full understanding of the WTO's political dynamics.

12. The Sub-Commission report on Globalisation and its Impact on the Full Enjoyment of Human Rights,[9] for instance, says that "the WTO has demonstrated particular opacity in the face of the demand for transparency". In the WTO context, a distinction is made between external and internal transparency. Internal transparency refers to the difficulties the economically weakest WTO members have in participating in WTO work as equals, often because developing country delegates have not been invited to key negotiating meetings or do not have the same information as their industrialized country counterparts. It was this lack of transparency and participation that was one of the key reasons given for the breakdown of talks at the WTO's Seattle Ministerial Conference, in December 1999.[10]

13. As regards external transparency, the WTO does indeed have a closed culture, far more so than other parts of the United Nations. Trade policy has traditionally been made behind closed doors, with information on country positions in international trade negotiations being fiercely guarded. Since civil society NGOs have until recently not sought to participate in any of the WTO's work or followed it closely, NGOs are on the whole an unknown quantity. And in this climate of lack of knowledge of NGOs' roles, many WTO delegates or secretariat staff are often not aware of the potential role of NGOs in providing information or policy advice,[11] or the nuances between different types of NGOs' positions or working methods.

14. Compounding this problem is the fact that the civil society NGOs who have been vocal and most visible in WTO discussions have been environmental or trade NGOs, advocating or supporting policies that either had hidden protectionist motives, or were perceived as having such motives. This is the case for instance of the environmental groups who have been saying that a country should be allowed to restrict imports of a product (shrimp, say) based on the way in which that product is produced. Many developing countries' delegates fear this as a way of limiting trade in products in which they have a competitive advantage, and are continuing to resist calls both for allowing distinctions between products based on their method of production, and for introducing new "linkage" issues such as environment and labour standards into the WTO. The resistance of developing countries to new, linkages issues should not be underestimated, and resistance to increased participation of NGOs in the WTO's work should be seen in this context.

15. Another illustration of the extreme sensitivity of the issue of opening the WTO's work to outside participants is the difficulty even intergovernmental organizations have in obtaining observer status with the WTO. This paper will not go into details about this, but it must be noted that the Secretariat of the Convention on Biological Diversity (CBD) has not been granted

observer status with the WTO TRIPs Council, and there is at present a stalemate in TRIPs Council regarding observer status for intergovernmental organizations. OPEC was also recently refused observer status with a WTO Committee.[12]

16. Despite the relatively closed nature of the WTO as compared to other international organizations, progress has been made in recent years. WTO documents are much more easily available, the Secretariat has set up a focal point specifically to deal with NGO relations, and it is now expected that panels and the Appellate Body will receive and consider non-governmental *amicus* briefs on cases which they have before them as a matter of course.[13] The issue of external transparency is on the WTO General Council's agenda and members themselves have called for steps to be taken to improve the WTO's image vis-à-vis the outside world. Moreover, the failure of the negotiations on an OECD Multilateral Agreement on Investment in 1998 has made many trade negotiators aware of the fact that it is now impossible to make trade policy behind closed doors and some Governments[14] have been taking steps to involve civil society groups in trade policy formulation at the national level.

17. There are two dimensions to the accusation that the WTO favours the powerful over the weak - on the one hand there is the issue of equity between different domestic interests (the United States pharmaceutical industry versus public health policy for instance), and on the other, the issue of international equity (large industrial countries versus small developing countries for instance). There is a significant body of literature on whether or not the WTO serves to increase the power of the strong over the weak, and this paper will not go into this point here. It will however question whether, if the WTO did not exist, there would be any requirement of transparency or limits to arbitrariness of international trade rules and policies, and whether there would be any forum to which the less powerful countries could take their grievances with regard to unfair international trade policies and practices.

18. Regarding equity between large, powerful (often corporate) interests and public interest considerations, as Audrey Chapman in her background paper before us today has pointed out "[i]ntellectual property laws are defined through closed, secretive international negotiations dominated by industry and are then brought to national legislatures as faits accomplis, without democratic deliberation".[15] The question for human rights and other public interest activists is: "to what extent does the WTO create or contribute to the problem?" and the next question is whether the question of inequity between the private interests of the powerful and public interests should be addressed at the international level, at the WTO - or rather at the domestic level.[16]

19. To conclude this succinct presentation of the WTO, the WTO may be part of a closed culture which traditionally favours corporate over public interests. However it is not a monolith and is capable of evolving and taking other concerns into account. Human Rights groups wanting to work towards ensuring that public interest concerns are taken into account by the WTO may find that the most appropriate place for raising their concerns is at the national level. But even at the international, WTO, level there is scope for raising public interest concerns, and such efforts may well meet with success, as long as they take the political dynamics and sensitivities found within the WTO into account and are directed to the appropriate part of the WTO.

20. The International Confederation of Free Trade Unions (ICFTU) has found a constructive way of bringing its concerns to the WTO and having them taken into account: it submits a report to the WTO Secretariat on labour conditions on countries due for their Trade Policy Review, in sufficient time for the issues it raises to be taken into consideration in preparation of the Secretariat report.[17] Other human rights groups - whether governmental or non-governmental - might find that following a similar course would be a useful way to bring their concerns and expertise to the attention of the WTO Secretariat and WTO members.

Intellectual property discussions currently under way in the WTO

21. This paper will not go into the content of the TRIPs agreement in any detail. It will nevertheless recall three points about the TRIPs agreement that are useful to bear in mind when thinking about TRIPs and international human rights obligations. First of all, the text of the agreement ("a widely arbitrated text put forward by the Chair of the negotiations as a Chair's text that he thought was a compromise"[18]) was a surprise to many developing country delegations, who felt it did not accurately reflect their positions. So why did they nevertheless accept it? The TRIPs agreement was one of a package of several international trade agreements adopted as a single undertaking, as the "WTO Agreement", in 1994. Thus, developing countries were prepared to accept rules ("disciplines" in WTO parlance) on intellectual property as a trade-off for concessions in other areas of interest to them, such as textiles and market access. Six years after the entry into force of the WTO Agreement, it is worth noting that the industrialized countries have been slow in implementing their obligations in the area of textiles, and in granting better market access for products of interest for developing countries. In addition, developing countries are facing major difficulties in implementing TRIPs - today it is estimated that over 60 developing country members of the WTO (out of a total of 139 WTO members) are in total non-compliance with TRIPs. These and related "implementation" issues are of central concern to developing country delegations to the WTO, and are the subject of discussion in special sessions of the WTO General Council, as discussed in more detail below.

22. Second, the TRIPs agreement is the first WTO agreement to prescribe minimum standards - previous multilateral trade agreements provided for concessions to be exchanged between members on a non-discriminatory and transparent basis.

23. Third, one of the points that comes up regularly in discussions about the conflicts between Human Rights and WTO rules is which body of law should prevail. One of the factors that has to be taken into account when undertaking a legal analysis of this sort is which is the most recent law (*lex posterior*), and some human rights advocates may feel discouraged at the fact that TRIPs is more recent than the International Covenant on Economic, Social and Cultural Rights. However, the TRIPs agreement does contain provisions that could limit its application in such a way as to harm human rights. These are to be found in its articles 7,[19] 8[20] and 27.2.[21]

24. Articles 7 and 8 of the TRIPs agreement are indeed one of the focuses of the different processes currently under way in the WTO regarding the TRIPs agreement.[22] These three processes are (1) the review of TRIPs article 27.3 (b); (2) the review of the implementation of the TRIPs agreement as a whole; (3) and the WTO General Council's special sessions on implementation concerns. These three processes are linked, and since all three have human rights implications they will be described below. It should also be noted that since there is no

agreement amongst WTO members as to whether or when there will be a new round of trade negotiations, there is a lack of momentum in the WTO in general, on all issues. Members are holding back on making clear negotiating proposals, waiting for a new round and the possibility this would provide for trade-offs between different members' interests.

25. **(1) 27.3 (b) Review**: Article 27.3 (b) of the TRIPs agreement says that a WTO member does not have to require patenting on life forms, except on micro-organisms and micro-biological and non-biological processes. Because of disagreements on the patenting of life forms and new plant varieties at the time of the adoption of the TRIPs agreement, a sentence was added to article 27.3 (b) providing that "[t]he provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement". That review did indeed begin in 1999, amongst disagreement on what the term "review" meant - many developing members of the WTO were of the view that it meant a review of the provisions of article 27.3 (b) itself, and allowed the possibility of amending the provision. Meanwhile some industrialized country members (the United States in particular) emphasized its view that "review" simply meant review of the implementation of the provision.

26. This review was scheduled to end in 1999, but amongst the disagreement between members as to the scope of the review and the collapse of the Seattle Ministerial Conference, it now finds itself in a kind of procedural limbo: the United States says that the review of article 27.3 (b) is over, whilst all other members believe it is ongoing. Meanwhile, there are differing views amongst members on the substance of the review: some countries would like to strengthen the patenting obligation and others would like to do away with it altogether. Some members have called for the article to be clarified or amended, for example to take account of traditional knowledge, community rights and biodiversity. India and other countries have for instance said that there is a serious problem of compatibility between TRIPs article 27.3 (b) and the Convention on Biological Diversity (CBD). Even Japan has noted that the TRIPs agreement is not suited to deal with the collective nature of traditional knowledge. Meanwhile, the United States and other industrialized countries say that there is no conflict between TRIPs and the CBD. The United States is refusing even to examine the relationship and it is in this context that it has objected to observer status for the CBD secretariat.

27. Given that any decision on article 27.3 (b) will have implications for plant variety protection and thus for indigenous knowledge, as well as for access to food because of the implications of patenting plant varieties and seeds,[23] the Committee on Economic, Social and Cultural Rights could find it interesting to intervene in these discussions, or keep abreast of developments and possibly raise related points in the examination of the periodic reports of relevant States parties to the Covenant.

28. **(2) TRIPs agreement review**: Meanwhile, the TRIPs Council is reviewing the TRIPs agreement according to article 71.1, which says that there will be a review of the whole agreement after the deadline for developing countries to implement it - i.e. 1 January 2000. This review is essentially a review of members' TRIPs implementing legislation, but given that TRIPs implementation is so difficult for developing countries, the TRIPs Council has had difficulties finding developing country candidates to undergo review. The TRIPs Council is meeting as we speak and the countries whose implementation it is reviewing include Turkey, Chile, Colombia, Estonia, Guatemala, Kuwait, Paraguay and Peru.[24]

29. Complicating issues is the fact that no one is quite sure what the current legal status is of the obligation on developing States to have implemented the TRIPs agreement by 1 January 2000. The reason this is unclear is linked to the lack of any decisions by the Seattle Ministerial Conference, which collapsed without agreement this time last year. The question of deadlines for implementation of several of the WTO agreements is under consideration at the WTO General Council special sessions on implementation concerns. In the meantime, however, the United States has made its view on the matter clear by bringing cases to the WTO Dispute Settlement Mechanism on the failure of two developing countries - Argentina and Brazil - to adopt TRIPs-consistent legislation by the 1 January 2000 deadline.[25]

30. **(3) General Council special sessions on implementation concerns**: One of the contentious issues in the lead-up to the Seattle Ministerial Conference (and one of the main reasons put forward for the collapse of the Ministerial) is the feeling of developing countries that their concerns were not being heard, both in terms of the process of the negotiations (see above) and the substance of the commitments they were being asked to make. During the Seattle preparatory process they were consistently calling for an assessment of the implementation of the existing WTO agreements to be made before introducing new issues onto the WTO's agenda.

31. Thus, after Seattle, the WTO established a special session of the General Council to review implementation, which has held four meetings in 2000. This implementation review is to address developing countries' concerns about imbalances in existing WTO agreements, as set out in the draft Seattle Ministerial Declaration, which called not only for changes in the implementation deadlines of several of the WTO agreements, but also for some of the provisions to be rewritten to make them more responsive to the needs of developing countries.

32. On the question of TRIPs, several - developing country - WTO members have called for a closer examination of articles 7 and 8 of the TRIPs agreement, arguing that there should be an assessment of the social, economic and welfare impacts of the agreement.

33. So far, however, discussions held in the implementation review have been mostly procedural and nothing has yet been decided.

Some possible avenues for action by human rights bodies

34. The above has pointed out that not only are there discussions under way in the WTO that open up questions at the intersection of the WTO intellectual property regime and human rights, but that there exist very real openings for the Committee on Economic, Social and Cultural Rights to intervene in these discussions on these questions today. This is all the more the case as the climate at the moment at the WTO is not one of negotiation (as it usually is, and as it will be as soon as a new trade round is launched, probably in late 2001), but rather one of reflection as members bide their time while waiting to decide whether and when a new round of multilateral trade talks will be launched.

35. To emphasize what Audrey Chapman points out in her background paper, unless human rights advocates seize this opportunity to provide an effective intellectual and organizational

counterweight to the forces of economic self-interest that naturally prevail in the WTO context, the intellectual property landscape will be reshaped in the years ahead without adequate consideration of the impact on human rights.

36. The Committee has been asked to clarify the relationship between intellectual property rights and human rights, including through the drafting of a general comment on this subject.[26] General discussions such as that held today are a step in this direction, and will contribute to a deeper understanding of the Covenant and how its intellectual property-related provisions are affected by WTO intellectual property rights regime, as well as to provide an opportunity to analyse in greater depth the nature and status of economic, social and cultural rights and the corresponding obligations of States parties to the Covenant.

37. **The key question then becomes: how to ensure that a better understanding of the relevant provisions of the Covenant on the part of the Committee and States parties can be effectively brought to the WTO's attention and reflected in the WTO's work and does not remain an interesting, but somewhat "theoretical" intellectual exercise?**

38. The Committee is in a unique position to bring human rights concerns to the attention of the WTO community, and this for five main reasons. First, its mandate is based on a legally binding international instrument, to which 143 States are parties. Of the 139 States currently members of the WTO, over 100 are also parties to the ICESCR, strengthening the Committee's role and giving legitimacy to any steps it might take to raise human rights concerns regarding the WTO's intellectual property regime. Second, a large proportion of the States parties to the ICESCR are developing countries, which can serve to reassure WTO members to whom ICESCR-related intellectual property concerns are brought that the mandate is not an industrialized country one, but a developing country one. Third, many developing countries are currently grappling with ways in which they can ensure that their concerns regarding the implementation of the WTO Agreement are taken into account. The ICESCR could provide a strong legal tool to assist them in this, and the Committee could work with trade delegates from developing countries to further explore this possibility. Fourth, the Committee's mandate asks for it to act both on a bilateral level, i.e. with individual States parties through examination of their periodic reports, and at the international level. Both these levels of action are necessary when seeking to intervene in WTO debates. Fifth, the experience the Committee has gained through the examination of State reports gives it added legitimacy when raising issues of concern with regard to the effects of the WTO intellectual property regime.

39. At the international level, the Committee on Economic, Social and Cultural Rights could seek to follow the work of the WTO on implementation issues as well as on the review of article 27.3 (b) and also feed into these processes, by offering information and expertise to the TRIPs Council or the General Council implementation review sessions. Beyond TRIPs issues, the Committee could also follow the lead of the International Confederation of Free Trade Unions and discuss with States parties whose reports it has examined the possibility of providing relevant information to the WTO Secretariat as it prepares the Secretariat report reviewing members' trade policies.

40. On an individual country level, the Committee could raise issues which it knows are sensitive in the WTO context in its discussions with individual States parties' representatives

when examining their periodic reports. Again to take an example from the background paper fo today's discussion, the Committee might want to, in the context of examination of States reports from States parties with high HIV/AIDS rates, ask whether these countries produce generic medicines, and whether their WTO and trade policy counterparts in the capital take into account the obligations under the Covenant when deciding policy on pharmaceuticals. The Committee could seek to explore with representatives of those countries the difficulties that trade policy ma pose to realization of the human rights embodied in the International Covenant on Economic, Social and Cultural Rights, and how human rights principles and norms might be applied to ensure that developing countries make the WTO's intellectual property regime work in their favour.

41. In conclusion, it should be recalled that at the end of the Second World War, when the international system that we know today was being set up, a three-pronged, triangular system was envisaged for international governance. The International Monetary Fund and the World Bank would cover financial governance, the planned International Trade Organization would cover trade issues and ECOSOC would have the role of ensuring that social concerns would be reflected. Sadly, ECOSOC has never played this role, and as we know, financial and trade forces have tended to be stronger than social and public interest ones. Now it is within the reach of the Committee on Economic, Social and Cultural Rights, backed up by a legally-binding international treaty - the International Covenant on Economic, Social and Cultural Rights - to which over 140 States are parties, to step in and play the role envisaged for ECOSOC over 50 years ago.

Notes

[1] Many examples of such clashes or potential clashes have been given elsewhere, see for instance Geoff Tansey, Trade, Intellectual Property, Food and Biodiversity (1999), on the web at <www.zen.co.uk/home/page/g.tansey/trips.html>, Graham Dutfield, "Can the TRIPs Agreement Protect Biological and Cultural Diversity?" (1997) or Rene Loewenson, *Essential Drugs in Southern Africa Need Protection from Public Health Safeguards Under TRIPs*, 4 Bridges Between Trade and Sustainable Development (September 2000) on the web at <www.ictsd.org/html/arct_sd.htm#Bridges>; UNDP Human Development Report 1999, and Human Development Report 2000; Lord Sydney Templeman, *Intellectual Property*, 1 Journal of International Economic Law, pp. 603-606 (1998).

[2] Preamble, Marrakesh Agreement Establishing the World Trade Organization.

[3] The full list of agreements which makes up the WTO Agreement can be found on the web at: <www.wto.org/english/docs_e/legal_e/ursum_e.htm#Agreement>

[4] Other parts of the WTO Agreement include the General Agreement on Tariffs and Trade (GATT) 1994, the Agreement on Agriculture and the General Agreement on Trade in Services. There are also four "plurilateral" agreements which are binding only on some of the WTO's members.

[8] Although on paper all countries are entitled to participate in all WTO meetings, many small or developing countries have in fact frequently been excluded from informal but key negotiating sessions, as discussed below.

[9] For more information on the functioning of the WTO, see <www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm>. See also Bernard M. Hoekman and Michel M. Kostecki, The Political Economy of the World Trading System - From GATT to WTO, Oxford: Oxford University Press, 1995.

[7] All WTO members' trade policies are reviewed, the frequency of each country's review varying according to its share of world trade. Canada, Liechtenstein and Switzerland are due for review in December 2000. For more details as well as the list of countries to be reviewed in 2001, see <www.wto.org/english/tratop_e/tpr_e/tpr_e.htm>.

[8] For more details on the functioning of the WTO's Dispute Settlement Mechanism, see Robert Hudec, The New WTO Dispute Settlement Procedure: An Overview of the First Three Years (1998).

[9] Preliminary report submitted by J. Oloko-Onyango and Deepika Udagama, E/CN.4/Sub.2/2000/13, 15 June 2000.

[10] See for instance *Agreement on Ministerial Declaration Eluding Negotiators Before Seattle*, BRIDGES Weekly Trade News Digest, Vol. 3, No. 45, 15 November, 1999, on the web via <www.newsbulletin.org/bulletins/WhichBulletin.cfm?Bulletin_ID=14&SID=>.

[11] In the words of a well-known and respected GATT/WTO commentator, John Jackson: "So far there seems to be no general explicit rules regarding a role for NGOs in various WTO activities. This has been a source of strong criticism of the WTO, particularly by environmental groups who argue that NGOs can bring important expertise and information to bear on the WTO." See John H. Jackson, The World Trade Organization - Constitution and Jurisprudence, (1998).

[12] The international organizations with observer status with the WTO General Council are the United Nations (UN), United Nations Conference on Trade and Development (UNCTAD), International Monetary Fund (IMF), World Bank, Food and Agricultural Organization (FAO), World Intellectual Property Organization (WIPO), Organisation for Economic Co-operation and Development (OECD). Other organizations have observer status in one or other of the other WTO councils and committees.

[13] Although this question still elicits controversy, see Chakravarthi Raghavan *Trade: Will AB listen to "strong signal" from General Council?* South-North Development Monitor (SUNS), 22 November 2000.

[14] See for instance, Stephen J. Kobrin, *The MAI and the Clash of Globalisations*, Foreign Policy Fall, 1998, at p. 99.

[15] Audrey R. Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)*, Committee on Economic, Social and Cultural Rights, E/C.12/2000/12, 3 October 2000.

[16] It is worth noting that bilateral agreements between the United States and other countries often require stricter intellectual property protection than that mandated by the TRIPs agreement often referred to as "TRIPs plus".

[17] The ICFTU reports to the WTO's Trade Policy Review Mechanism are available on the web via <www.icftu.org>

[18] *SUNS* 2000.

[19] Article 7 of the TRIPs agreement, entitled "Objectives" reads: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technical knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

[20] Article 8 of the TRIPs agreement, entitled "Principles" reads: "1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of the agreement. 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

[21] Article 27.2 reads: "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect public order or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law."

[22] It is however important to note in this context, that the WTO's Dispute Settlement Mechanism has been criticized for "failing to interpret the TRIPs Agreement in a manner that does justice to the delicate balance of social and economic interests reflected in the stated purposes of that Agreement", particularly for not giving due weight to articles 7, 8 and 27.1. See Robert Howse, *The Canadian Generic Medicines Panel, A Dangerous Precedent in Dangerous Times*, 3 Journal of World Intellectual Property (July 2000), at 506.

[23] See Geoff Tansey and Graham Dutfield, note 2 above.

[24] The list of those whose legislation will be examined at the next TRIPs Council is public and can be obtained from the WTO Secretariat.

[25] See *BRAZIL - MEASURES AFFECTING PATENT PROTECTION, Request for Consultations by the United States* WT/DS199/1, 8 June 2000, and *ARGENTINA - CERTAIN MEASURES ON THE PROTECTION OF PATENTS AND TEST DATA Request for Consultations by the United States*, WT/DS196/1, 6 June 2000, on the Web via: <www.wto.org/ddf/ep/search.html>

[26] By the Sub-Commission in its resolution *Intellectual Property Rights and Human Rights*, of August 2000, E/CN.4/Sub.2/Res/2000/7.